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PROOF OF THE BREACH IN NEGLIGENCE CASES (INCLUDING RES IPSA LOQUITUR)

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THE PLAINTIFF has the burden of proving each of the essential elements¹ of a cause of action for negligence. The term burden of proof is used in two senses. The first is often called the burden of going forward with evidence and it means that if the plaintiff does not, in the first instance, introduce evidence on each element which is sufficient to warrant a finding in his favor, he will lose his case at the hands of the court (by nonsuit, directed verdict, or the like). If the plaintiff has introduced sufficient evidence (before he rests his case) he has made out a prima facie case and is entitled to go to the jury. His burden of going forward is met and drops out of the case. Thus the burden of going forward with evidence is applied always by the court, never by the jury. Burden of proof in the other sense does not come into play until a case is finally submitted to the jury (or court as trier of facts) for determination. In that process the trier may find the evidence on any given issue in equipoise—or his mind may be in equipoise as to the evaluation of conduct as negligent or careful. In that event, he who has the burden of proof in this sense of the risk of non-persuasion, must fail. This burden is applied by the trier of facts, and in a jury case the charge must define this burden and tell the

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1. What these essential elements are is determined by the substantive law.

jury how to apply it. In civil cases generally the plaintiff is entitled to prevail if the jury finds that *more probably than not* the facts are as he alleges. This does not mean all the facts (e.g., every item of negligence) but so many of them as constitute the essential elements of his cause of action as defined by the court in its charge.²

At present we are concerned with the issue of negligence, which may be broken down into duty and breach of duty. Duty in turn may be further broken down into the duty to use care towards plaintiff under the circumstances of the case, and (where this duty does exist) the standard of conduct which those circumstances require of the parties.³ In many cases, neither the general duty nor the standard of conduct presents any problem of proof at all.⁴ Thus in a typical highway collision case the duty towards plaintiff is perfectly apparent and the jury is fully competent to set the specific standards of conduct without evidence. But there must always be *some* proof (direct or circumstantial) of what the parties did, and of the circumstances of the case, before the question of duty may be decided and before the jury will be allowed to evaluate the conduct as reasonable or not under the circumstances. It is this problem that concerns the present article. But it should be noted at the outset (and will be pointed out again in appropriate places) that proof of what happened and of the proper standard of conduct and of the general duty is often involved in practice.

DIRECT EVIDENCE

In the final analysis all proof requires some process of inference, before it can be translated into an actual decision by the trier. We are accustomed, however, to divide proof into direct and circumstantial. When evidence of a fact is in the form of testimony by a purported observer of that fact, we call the evidence direct, *as to that fact*. And where that fact in turn is one of the propositions which a party is trying to establish as his side of an ultimate issue made by the pleadings in the case, then the evidence is direct evidence in that

2. An exhaustive treatment of the above may be found in 9 WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

3. See PROSSER, TORTS c. 5, 6 (1941).

4. Of course it may; and even where no proof is required on these issues, it may be tactically desirable to offer it. See e.g., MORRIS, *Custom and Negligence*, 42 COL. L. REV. 1147 (1942); MORRIS, *The Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEX. L. REV. 1 (1947).

case.⁵ The only processes of inference involved have to do with the credibility (including accuracy of observation, memory, etc.) of the witness and the accuracy of his means of communication. Where the thing itself, which is one of the facts in issue (such as the torn carpet that caused the accident, or the injured limb), is put before the trier for actual inspection we call the evidence "real evidence."⁶ In all other cases proof is called circumstantial and will be seen to require further processes of inference. Typically it involves proof of fact A (which is not itself a fact in issue⁷) as the basis of an inference of the existence of fact B (which is in issue).

In many accident cases there is direct evidence as to the conduct of the parties and the surrounding circumstances. To the extent that this is so the functions of the tribunal are (1) to find out what happened (resolving questions of credibility and conflicts among witnesses) and (2) to determine whether that conduct was negligent.⁸ The latter function is often called "drawing an inference of negligence"⁹, but that is a confusing use of language. The process is really one of evaluating facts (conduct) in terms of legal consequences.¹⁰ It is better to save the word "inference" for the process of deducing from the existence of one fact the probable co-existence of another fact. We shall use the word "inference" only in that way. Now in the case put (where there is direct evidence of what the parties did) the court will send the case to the jury on the issue of defendant's negligence if there is substantial evidence of any version of the defendant's conduct which the court is willing to let the jury characterize as negligent. The problem presented is not so much one of the sufficiency of proof¹¹ as it is of the latitude of the jury's sphere in applying standards of conduct. There are, however, two

5. 1 WIGMORE, EVIDENCE § 24.

6. 1 WIGMORE, EVIDENCE § 24. Examples are *Robbins v. Thies*, 117 N.J.L. 389, 189 Atl. 67 (1937); *Norton v. Anderson*, 164 Wash. 65, 2 P.2d 266 (1931). See Comment, 26 TEX. L. REV. 188 (1947).

7. Of course, fact A may also be in issue. The evidence is then direct as to fact A and circumstantial as to fact B.

8. See James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949).

9. See, e.g., *Malone, Res Ipsa Loquitur*, 4 LA. L. REV. 70, 71, 72, 76, 78, etc. (1941) (an otherwise excellent article).

10. HOLMES, THE COMMON LAW 120-21 (1881). James, *supra* note 8, at 676.

11. Of course there may be a very vital question of proving to the jury's satisfaction that the accident happened as plaintiff claims, but we are here discussing merely the sufficiency of the evidence to make out a *prima facie* case.

ways in which the sufficiency of direct evidence to prove the fact testified to may come into question. In the first place, here as elsewhere the courts retain the power to set the limits of what is credible evidence. Thus in *Baril v. New York, N.H. & H. R.R.*,¹² the plaintiff testified that he was hurt when he fell on unlighted stairs while he was passing from the ticket office of defendant's railroad station, under its tracks through a subway up to the platform on the far side of the tracks where he intended to take a train. Defendant however called six disinterested witnesses who testified that a half hour before the claimed accident, plaintiff was lying drunk on the platform on the near side of the tracks, two hundred feet from the stairs in question; that he was then removed to the hospital where he received surgical treatment; that he was taken from the hospital to the police station and booked on a charge of intoxication. The court felt that under all the circumstances plaintiff's evidence would not support a verdict in his favor.

In addition to the power generally retained by courts to set the outer limits of credibility, there is occasionally applied an artificially high standard of proof in some types of cases, such as those where a passenger is injured by the jerk or jolt of a train or other conveyance. Some courts, for instance, hold that such a jerk or jolt is not sufficiently proved by testimony which simply describes the jolt's severity by appropriate adjectives.¹³ There must be corroboration, such as a showing that other passengers, too, were thrown, and it is not enough corroboration to state that the plaintiff's own injury must have been caused "by a lot of force," and that all the passengers

12. 90 Conn. 74, 96 Atl. 164 (1915).

13. *Coyle v. Pittsburgh Ry.*, 149 Pa. Super. 281, 27 A.2d 533 (1942); *Monahan v. Pittsburgh Ry.*, 149 Pa. Super. 283, 27 A.2d 534 (1942); *Hawkins v. Pittsburgh Ry.*, 146 Pa. Super. 185, 22 A.2d 73 (1941); *Seidenberg v. Eastern Mass. St. Ry.*, 266 Mass. 540, 165 N.E. 658 (1929); *Norfolk and W. Ry. v. Rhodes*, 109 Va. 176, 63 S.E. 445 (1909). Cf. *Norfolk and W. Ry. v. Birchett*, 252 Fed. 512 (4th Cir. 1918); *Brocato v. United R. & E. Co. of Baltimore*, 129 Md. 572, 99 Atl. 792 (1917).

Even sufficient proof of an extraordinary jerk or jolt is not, of course, direct evidence of negligence. There is still the further question whether negligent operation of the train, etc., may be inferred from such occurrence. But the evidence questioned in these cases is direct evidence of the fact of the jerk and its severity. And while some of the opinions are confused on the point, the decisions seem based in part on the *failure of proof of the extraordinary severity of the jerk* (coupled with a concession that such a jerk if properly shown would afford an inference of negligence). To this extent, then, this rule is one which concerns the adequacy of direct evidence.

"sort of crumpled."¹⁴ It will be enough, however, if the plaintiff can link the unusual jerk with some other specific negligence in operating the car, such as excessive speed around a curve.¹⁵ The policy behind such a rule is protection against false claims too easily fabricated.¹⁶ But the danger of such a policy is that meritorious claims will be penalized through mistrust in the ability of judges and juries to find the truth, and some courts have thought this the greater evil.¹⁷ Beyond these two ways in which the question arises as to the sufficiency of direct evidence to make a *prima facie* case of negligence, the principal questions of proof (which are not peculiar to the present subject), concern the admissibility of evidence, the matter of effective examination and cross-examination of witnesses, and the matter of persuasiveness in argument.

CIRCUMSTANTIAL EVIDENCE

Even where there is direct evidence as to the material conduct of the parties, it is a rare case where there is not also some circumstantial proof. The borderline between the two is often a hazy one. Because negligence is conduct and not a state of mind, and because that conduct is tested so largely by an objective standard,¹⁸ it is often possible to have direct testimonial description of the personal conduct of defendant (or his agent) which (without any further process of inference as the word is being used here) may be characterized by the jury as negligent. A witness may testify as to the speed at which defendant was driving his automobile on a crowded thoroughfare,

14. *Hawkins v. Pittsburgh Ry.*, 146 Pa. Super. 185, 22 A.2d 73 (1941).

15. *Rucker v. Pittsburgh Ry.*, 153 Pa. Super. 63, 33 A.2d 441 (1943).

16. See the opinion of Chief Justice Cardozo in *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482, 166 N.E. 173, 174 (1929). "He cannot help himself to a verdict . . . by the . . . facile comment that it threw him with a jerk."

It has been suggested that with present day transportation and its speed a certain amount of jerking and jolting is unavoidable and to be expected so that any more lenient rule would make it impossible for street railways to operate. 48 DICK. L. REV. 109, 111 (1944). But this confuses standard of conduct and proof of breach. The substantive law should and does reflect the policy mentioned, and the carrier will be held only for extraordinary jerks and jolts. The rule in question is concerned with the measure of proof required to make out what is admittedly a wrong. In that respect it is like other rules found elsewhere in our law. See discussion of synthetic (or, quantitative) rules in 7 WIGMORE, EVIDENCE § 2030-73.

17. See *Belledeau v. Connecticut Co.*, 110 Conn. 625, 149 Atl. 127 (1930).

18. See Edgerton, *Negligence, Inadvertance and Indifference*, 39 HARV. L. REV. 849 (1926); Seavey, *Negligence, Subjective or Objective*, 41 HARV. L. REV. 1 (1927).

or that he was talking with someone on the back seat with his head turned around when plaintiff stepped off the curb. Such conduct may itself be found to constitute excessive speed or the failure to keep a proper lookout. But suppose the testimony to be that the (moderate) speed of the automobile was virtually unabated and that the witness (a passenger) felt no application of the brakes before the automobile struck plaintiff, a pedestrian who stepped off the curb at a crosswalk, in plain sight, when the automobile was still a good stopping distance away.¹⁹ The witness did not see the bodily motions of the driver because he was watching the pedestrian. Such testimony would everywhere be deemed sufficient evidence of negligence to take the issue to the jury.²⁰ Yet any conclusions as to what the driver himself did or failed to do must rest on inference. And several competing inferences are possible. Some of them are: (1) the driver failed to keep a proper lookout (i.e. failed to see a pedestrian in plain sight at a place where his presence was to be expected); (2) the driver saw the pedestrian but became confused, or reacted slowly, and failed to put on the brakes; (3) the driver did press the brake pedal, but the brakes failed to work. In this case the brake defect might have been one that the driver-owner knew of or should have detected; on the other hand it might have been due to sudden loss of the brake fluid because of a latent undiscoverable defect in the braking mechanism. If the last explanation is the true one, then the testimony of our hypothetical witness—even if fully believed—does not mean that the driver's conduct was the kind which a jury could call negligent.²¹

19. Of course the opinion rule would often forbid testimony couched in some of the terms in the text. They are used simply to summarize, for brevity.

20. Research has disclosed no case as favorable to the plaintiff as the one posed. Among the many cases in which less conclusive circumstantial evidence has sufficed to get the plaintiff to the jury may be cited *Scheuermann v. Kuetemeyer*, 186 Cal. 225, 199 Pac. 13 (1921) (nonsuit at close of plaintiff's evidence in automobile accident case held error where evidence showed that in broad daylight plaintiff had been hit from behind while walking along right side of highway on unpaved shoulder not ordinarily used by automobiles, and that automobile gave no warning of its approach and had no apparent mechanical defects), and *Glover v. Struble*, 159 Pa. Super. 305, 48 A.2d 50 (1946) (testimony showed that defendant was driving on wrong side of unobstructed highway in broad daylight and "drove straight toward" plaintiff's intestate, aged five, who was seated on a tricycle and was not moving).

21. *Romansky v. Cestaro*, 109 Conn. 654, 145 Atl. 156 (1929). Of course, a state might have legislation imposing an absolute duty to have brakes in working order, and under such a statute the result would be different. *Madison v. Morovitz*, 122 Conn. 208, 188 Atl. 665 (1936); *Pappaceno v. Picknelly*, 135 Conn. 660, 68 A.2d 117 (1949).

The proof therefore does not *demonstrate* negligence or altogether preclude a finding of due care. Most of the possible inferences from, or explanations of, the testimony do, however, involve conduct which a jury (to say the least) *could* call negligent. Moreover if the testimony of our hypothetical witness stood alone most men would say, on the basis of our common experience with such things, that the non-negligence explanation of the proof was less probable than the sum of the explanations which pointed to negligence. In the illustration the inference of negligence²² is pretty strong, and no serious problems arise as to the relevancy of any of the testimony. It is fairly close to the realm of direct evidence, yet it will serve as an example of the process of inference and of the manner in which probabilities are assumed to be weighed in that process. As the balance of probabilities becomes closer and less clear, the process of inference becomes more attenuated and problems increase. These problems concern principally (1) the admissibility of evidence offered as circumstantial proof of a fact in issue, and (2) the sufficiency of circumstantial evidence to support a finding of negligence. The balance of the article deals with the second of these problems.

THE SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE

After the plaintiff's evidence is in, and again at the close of all the evidence, and later still on a motion after verdict, or upon appeal, the question may arise whether the plaintiff has made out a *prima facie* case. And if plaintiff is relying on circumstantial evidence to establish any of the elements of his cause of action, this may involve the question of the legitimacy of the inferences which he claims should be drawn. So far as defendant's negligence goes, these must warrant a finding that defendant's conduct was such that a jury would be entitled to characterize it as negligent. What, then, is the test of the legitimacy of an inference?

The test is often expressed in this way: where from the facts most favorable to the plaintiff the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation,

22. As noted above, this term is used to denote the inference that there was in fact conduct which a jury would be warranted in characterizing as negligent, *not* the process of thus characterizing given conduct.

surmise, and conjecture and a jury will not be permitted to draw it.²³ "[W]here the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that there is no sufficient proof."²⁴ It has been suggested that this "may be an overstatement of the quantum of proof required,"²⁵ but it represents the more usual formulation. Several aspects of this test should be noted:

(1) It is directed to the court's function (as invoked by motion for nonsuit, or the like) and not to the jury's, and is to be differentiated from the rule to be applied by the jury. The court must determine whether the existence of fact A (which has been testified to) is more probably than not, *as a generalization*, attended by the coexistence of fact B. If the court makes the initial determination in favor of the legitimacy of the inference, the issue goes to the jury to determine whether upon the preponderance of the evidence *in this case* they find (a) that fact A probably *did exist* and, if so, (b) whether fact B probably *did exist* (again, in this case).²⁶

(2) While this test is not unlike that for determining the *relevancy* of circumstantial evidence, which was touched on in the preceding section, the test for relevancy is less strict. If that were not true a party could not build his case by piecing proof together.

(3) The test is one of delusive exactness. The appearance of exactness is imparted by using the language of mathematics. The delusion lies in our almost complete lack of anything approaching accurate knowledge of where the balance of probability lies in many of the situations presented by the cases. Of course some generalization would command wide, even universal, support. These are the judg-

23. See PROSSER, TORTS 292 (1941). It has also been stated this way: "If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponderance of its likelihood . . . and excluding other probabilities just as reasonable . . . the plaintiff should not be permitted to go to the jury." *Nash v. Raun*, 149 F.2d 885, 888 (3d Cir. 1945).

24. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 194 (1949).

25. *Gutierrez v. Public Service Int. Trans. Co.*, 168 F.2d 678, 680 (2d Cir. 1948).

26. The function of judge and jury at this point are often described in language which makes them appear to be identical. See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 194 (1948). But clearly, no such result is intended. The language in the text attempts a more accurate description. See also Michael and Adler, *The Trial of an Issue of Fact*, 34 COL. L. REV. 1224, 1482, 1490 (1934); and WIGMORE, EVIDENCE § 2487 (general) and § 38 (illustrations comparing function of judge in determining questions of relevancy with function of jury in assessing the weight of evidence).

ments of "common sense." But even here it is not safe to forget how often the science of the morrow makes a fool of the common sense of today. Moreover the area is vast wherein thoughtful men who accept today's common sense would either disagree or refuse to guess on which side of the line the greater probability lies. The courts, however, cannot afford to adopt a scientifically agnostic premise in this field—this would paralyze too much of the law. And in many cases it is neither common nor practically feasible²⁷ to call on those experts who know as much as anyone about the probabilities in their areas of special competence. The result is a void, so far as accountability to any genuinely scientific standards go; it is a matter

27. It may be urged that every effort should be made by the court to get whatever evidence of this kind there may be. See suggestion of Frankfurter, J., in *Johnson v. United States*, 333 U.S. 46, 53 (1948) noted in 58 YALE L.J. 183 (1948). Cf. Note, 61 HARV. L. REV. 692 (1948); opinion of Frank, J., in *Repouille v. United States*, 165 F.2d 152 (2nd Cir. 1947) (dissenting opinion) (in an entirely different context). This opens up a serious controversy that goes to the very roots of the problem. My position is this. I concede at once that tribunals should seek the best light they can get on facts which are relevant to the real policy questions which a decision involves, and that in such a quest they should not rely upon "a priori conjectures and partially informed hunches." See Davis, *Official Notice*, 62 HARV. L. REV. 537, 551 (1949). But in accident cases I believe compensation and some form of social insurance (like workmen's compensation) to be desirable and that until this can be had, every aspect of the present system which produces some of the benefits of social insurance should be fostered, and every aspect which thwarts those benefits should be minimized. Further, I believe that fault is an outmoded criterion of liability in this field, so that any attempt to pursue fault more effectively is at best a barking up the wrong tree. And if the more rigorous pursuit of fault tends to block some of the already attainable benefits of social insurance (as it would here), then I think it would be like spending good money for fool's gold. I have tried elsewhere to elaborate this position. James, *Contribution Among Tort Feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); James & Dickenson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

Naturally those who believe fault to be a satisfactory basis for accident liability will reject my position. But even among those who favor or accept the notion of social insurance here, there is a school of thought that would have it all or none. Such people feel that any such change should come about through comprehensive legislation; that unless and until it does the courts should stick religiously to the fault principle and its implications, and refine them, both procedurally (Frankfurter, J., in *Johnson v. U.S.*, *supra*) and substantively (Gregory, *Contribution Among Joint Tort Feasors: A Defense*, 54 HARV. L. REV. 1170 (1941)), even though this should take us farther away from reaching some of the benefits of social insurance under our present system. To justify such a position it may be urged (a) that any attempt to attain the benefits of social insurance within the framework of fault will inevitably be incomplete and imperfect and may be capricious, and (b) it will also relieve the pressure towards a more complete and comprehensive solution—the worse you make the present system

of dealer's choice and the court is the dealer. In fact the courts are constantly asserting or assuming generalizations about human behavior and all sorts of other matters which either rest on the court's own very fallible notions about such things (which, since judges are human, often reflect veritable old wives' tales current in the culture of the community)²⁸ or spring from considerations of policy and expediency, more or less consciously perceived.²⁹ All this is most clearly illustrated by *res ipsa loquitur* cases, as we shall see, but it runs throughout the whole field of circumstantial evidence.

the greater the likelihood of getting it changed. See Frankfurter, J. (concurring in part), in *Urie v. Thompson*, 337 U.S. 163, 197 (1949). Cf. Peairs, *The God in the Machine*, 29 B.U.L. REV. 37, 77 (1949); Kaufman, *Torts*, 1949 ANNUAL SURVEY OF AMERICAN LAW 886.

The first of these contentions poses a real problem. Some of the vagaries (though not the main thrust) of the family car doctrine, or the attractive nuisance doctrine, bear witness to that. It is a problem, however, that can be solved or minimized by careful and realistic thinking. See, e.g., *Dunlap v. Dunlap*, 84 N.H. 352, 150 Atl. 905 (1930). Moreover caprice and folly may attend attempts to ignore the facts of life in the pursuit of doctrinal orthodoxy. See, e.g., *Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33, 130 A.L.R. 883 (1940).

So far as the second contention goes it may not even be good theory. Hardship may beget distortion and excess rather than sound corrective measures (though I must say in candor, that I should not expect these particular hardships to build up enough pressure to create much of a danger on this score). In any event, the point of view it represents is utterly visionary. Since judges are human (and in addition, many of them are elected) they are simply not going to blind themselves to the hardships of the present system or to the pressures towards social insurance, so as to make the very system they administer an intolerable yoke to be thrown off.

28. "Prior to 1492 counsel would not have disputed that the world was flat. Yet since that date it is equally undisputed that the world is round. Nor would it have been disputed by Bostonians in the seventeenth century that witches and their curses were an imminent peril to the community. What one generation regards as beyond dispute, the next may well laugh at!" Keefe, Landis, & Shaad, *Sense & Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 665 (1950). Cf. *Raymond v. Fish*, 51 Conn. 80 (1883) in which a presumably well informed board of health abated oyster beds as a nuisance in the belief they were the cause of epidemics of scarlet fever and diphtheria. Probably we are too close to our contemporary culture to identify those generally held beliefs which will seem absurd to future generations.

29. This is by no means confined to the area of law under discussion. Thus in passing on the constitutional validity of statutes courts often make assumptions as to broad sociological or economic facts (either tacitly or explicitly) on the basis of judicial notice. See, e.g., Notes, 49 HARV. L. REV. 631 (1936); 61 HARV. L. REV. 692 (1948); Denman, *Comment on Trials of Fact in Constitutional Cases*, 21 A.B.A.J. 805 (1935). The same thing is often true where the court is called upon to adopt or reject a rule of law. See discussion in *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). Cf. *Repouille v. U.S.*, 165 F.2d 152 (2d Cir. 1947) (a naturalization case where the issue was whether a "mercy killing" was inconsistent with possession

In addition to the general test (stated above) for the sufficiency of circumstantial evidence, there is occasionally asserted a proscription against "building an inference on an inference."³⁰ No such test has ever been applied literally and uniformly, nor is there any rational justification for it.³¹ Few cases are tried where inference is not piled on inference two and three deep. A very simple and familiar example will suffice. A man flees the scene of a crime or tort. From his flight we may infer a consciousness of guilt; from the consciousness we may reason to the fact of guilt.³² If the rule means simply that the jury will not be allowed to draw an inference from proof which does not point to it with sufficient probability, then its meaning is unobjectionable but the form of statement is unfortunate and misleading. It has sometimes been applied mechanically to preclude inferences that seem well within the realm of what is reasonable by any rational standard.³³ The rule should be repudiated outright and a statement such as the California court recently made used in its stead: "In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference."³⁴

Circumstantial proof may be sufficient to meet the burden of proof on an issue like negligence even though the inference is equivocal as to just what the party's specific acts or omissions were. This is so whenever it appears sufficiently likely that defendant's conduct included *some* act or omission which a jury could call negligent.³⁵

of "good moral character." In his dissenting opinion, Judge Frank emphasizes the limitations under which the judge, unaided, labors in trying to find "contemporary public opinion", and concludes that "sometimes 'judicial notice' actually means judicial ignorance".)

In Davis, *Official Notice*, 62 HARV. L. REV. 537, 549 *et seq.* (1949), appears an interesting account of Supreme Court cases where varying techniques of guesswork or investigation were used to secure the broad "legislative facts" on which the determination of constitutional or other legal questions depended.

30. See Note 95 A.L.R. 162 (1935); 1 WIGMORE, EVIDENCE, § 41.

31. 1 WIGMORE, EVIDENCE, § 41, vigorously supports the view taken in the text. See also the very good treatment in Note, 95 A.L.R. 162 (1935).

32. *Kotler v. Lalley*, 112 Conn. 86, 151 Atl. 433 (1930); *State v. Ford*, 109 Conn. 490, 146 Atl. 828 (1929).

33. Such cases are collected in 1 WIGMORE, EVIDENCE, § 41 n. 2; 20 AM. JUR. 164, 165 (1939); Note, 95 A.L.R. 162, 175 n. 22.

34. *Vaccarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 698, 163 P.2d 470, 477 (1945). See also *Lemmon v. Paterson Constr. Co.*, 75 A.2d 385 (Conn. 1950); Note, 95 A.L.R. 162, 181 *et seq.* (1935).

35. See *Shea v. Hern*, 132 Me. 361, 171 Atl. 248 (1934) (plaintiffs, passengers, offered only slight evidence of specific negligent acts on the part of the driver. The court,

Earlier in the article, for instance, the case was supposed where a passenger in an automobile testified that it proceeded at moderate but unabated speed and that he felt no application of the brakes after he saw a pedestrian step off the curb at a crosswalk. The witness did not observe the driver's actual conduct. If this testimony is believed, it is open to a number of possible alternative explanations as we noticed (failure to see, confusion or misjudgment, mechanical brake failure, and so on). It may well be impossible to say that any *one* explanation is more probable than not—that is, that its probability exceeds the sum of the probabilities of *all* the alternative explanations. Yet most of the explanations (and the weight of probability) include some conduct which a jury could call negligent, while only one of them did not (i.e., brake failure due to undiscoverable cause). If, therefore, the pleadings are broad enough to cover all the explanations pointing to negligence (either because of their generality or because they enumerate specifically all the possibilities), the jury will be allowed to draw an inference of negligence.³⁶

While circumstantial proof may afford an inference of negligence, though equivocal in the sense described in the last paragraph, yet it must cover *all* of the necessary elements of negligence to make out a *prima facie* case on that issue.³⁷ Failure at this point is a common shortcoming, which often springs from a lack of careful attention to the substantive requirements of negligence. In a great many types of

refusing to upset verdict for plaintiffs, notes the large range of possible explanations for the accident and points out that "if evidence must be offered in every instance not only to prove that an accident has happened but why it happened, many plaintiffs may fail to establish their cases where the inference of negligence is clear." *Id.* at 365, 171 Atl. at 250; *Frenkil v. Johnson*, 175 Md. 592, 3 A.2d 479 (1939) (plaintiff recovered for injuries suffered as result of explosion of escaping gas in building which defendant was demolishing. The court states, "Should . . . the cause of the injury be attributable to one or more things or acts for all of which the defendant was responsible the plaintiff may recover without showing which particular one was the cause of the injury". *Id.* at 605, 3 A.2d at 484); *Bishop v. St. Paul City Ry.*, 48 Minn. 26, 50 N.W. 927 (1892) (conflicting evidence as to cause of streetcar going out of control down a steep hill; verdict for injured passenger upheld, "even though the jury were unable to determine the precise nature or location of the defect").

36. Since in such a case the proof "is insufficient to sustain a finding of negligence in either particular considered separately," the jury should not be required by interrogatories to make separate findings upon the competing explanations involving negligence (e.g., separate findings upon negligence in construction and negligence in maintenance). *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 123, 38 N.E.2d 455, 463 (1941).

37. 9 WIGMORE, EVIDENCE, § 2487.

cases there is a twofold aspect of these requirements which is sometimes lost sight of in proof. Where an intending passenger falls on a station platform, for instance, he must show not only that he fell because of some condition of the platform that could be found to make it unreasonably dangerous, but also that this dangerous condition was one which defendant could have prevented or cured by taking some reasonable precaution (which he was bound to take). The plaintiff must show not only the defect but that the defect was negligently caused or allowed to remain by defendant. Suppose, for example, plaintiff shows he slipped on a banana peel. Clearly a jury would be allowed to find that a banana peel on a station platform constitutes a defective condition. But there are possible explanations of its presence there which do not involve the railroad's negligence; for one thing another passenger may have dropped it the moment before the accident. And on the bare facts given above, courts generally have found that the likelihood of an explanation not involving negligence is so great that an inference of negligence may not be drawn.³⁸ Something more must appear to close the gap. The additional proof that does this may show either that defendant (here its employees) created the condition by conduct that could be called negligent (*e.g.*, an employee dropped the banana peel)³⁹ or that there

38. *Montgomery Ward & Co. v. Lamberson*, 144 F.2d 97 (9th Cir. 1944) (plaintiff has no right of action for injuries suffered in fall while leaving defendant's store via wet ramp in absence of any showing that defendant caused or had notice or knowledge of the dangerous condition and was negligent in not remedying it); *Whitehead v. Halliburton, Inc.*, 190 Okla. 120, 121 P.2d 581 (1942) (action against store owner cannot be maintained for injuries sustained in fall alleged to be the result of defendant's failure to keep stairs free of waste paper in absence of evidence that defendant knew or should have known of the presence of the paper); *Norton v. Hudner*, 213 Mass. 257, 100 N.E. 546 (1913) (plaintiff slipped on piece of meat on floor in meat market; no evidence of negligence on the part of the defendant); *Goddard v. Boston & Maine R.R.*, 179 Mass. 52, 60 N.E. 486 (1901) (plaintiff slipped on banana peel on station platform; no further evidence); *Kendall v. City of Boston*, 118 Mass. 234, 19 Am. Rep. 446 (1875) (mere fact that bust of Franklin, on balcony above plaintiff, fell on her as she stood at her seat downstairs in music hall during concert held insufficient to get her to jury on issue of negligence of lessee of hall in absence of evidence as to manner in which bust was secured).

39. Proof that the defendant created the condition may be furnished by the direct evidence of an observer, or circumstantially, as by the testimony that there was nothing on the floor before an employee was seen to pass by carrying an overloaded refuse container. See *Sears Roebuck & Co. v. Peterson*, 76 F.2d 243 (8th Cir. 1935) (cord over which customer fell, injuring herself, had been thrown or left in aisle by one of defendant's clerks). Cf. *Henderson v. Progressive Optical System*, 57 Cal. App. 2d 180, 134 P.2d 807 (1943) (patient slipped on over-waxed floor of defendant's recep-

was a failure to discover and cure the situation although there was a reasonable opportunity to do both. A basis for an inference to this effect is usually laid by proof that the defect was *reasonably discoverable*, and had existed for a *long enough time* to have been discovered and cured by pursuing a standard of precautionary conduct that a jury would be allowed to impose on defendant under the circumstances of the case. Sometimes, as with the banana peel, the very nature of the defect shows that it was obvious.⁴⁰ The missing link can then be supplied by showing that it was there for a considerable period of time.⁴¹ The nature of the defect may indicate a sufficient circumstantial likelihood of this conclusion too, as where the testimony described the banana peel as "black, flattened out and gritty."⁴² Or

tion room; inference reasonable that acts of defendants, who were in control of the office, created floor's condition); *Ohran v. Yolo County*, 40 Cal. App.2d 298, 104 P.2d 700 (1940) (slipperiness of highway, causing automobile accident, attributable to County's failure to properly surface highway); *Moone v. Kroger Grocery & Baking Co.*, 148 S.W.2d 628 (Mo. App. 1941) (grocery store owner responsible for injuries to customer arising from slip and fall over vegetables spilled into aisle from sloping counters, notwithstanding that third parties, not defendant, actually spilled the vegetables, because defendant created and knowingly maintained the conditions leading to the spillage). See also cases cited in 65 C.J.S. 548 n. 24 (1950).

40. But, of course, frequently a case may turn on whether the particular defect that caused the injury was of such a nature that the defendant either must have or should have known of its existence. In such a case both elements of constructive notice (discoverable nature of the defect and its existence for a long enough time) may have to be established.

41. See cases in notes 42 and 43 *infra*.

The setting of the requisite length of time is a part of fixing the standard of conduct. An excellent statement of the factors to be considered in setting this length of time is found in *Moore v. American Stores Co.*, 169 Md. 541, 551, 182 Atl. 436, 440 (1936): "What will amount to sufficient time depends upon the circumstances of the particular case, and involves consideration of the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunities and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequences of the conditions".

42. *Anjou v. Boston Elevated Ry.*, 208 Mass. 273, 94 N.E. 386 (1911). See also *Kaplan v. Grand Department Stores*, 118 Conn. 714, 174 Atl. 76 (1934) (bulge in rubber mat at top of stairway came about through "wear extending over a considerable time"); *Hudson v. F. W. Woolworth Co.*, 275 Mass. 469, 176 N.E. 188 (1931) (candy in aisle "all flattened out", had to be scraped off floor, and the floor under it was clean but around it was dirty); *Langley v. F. W. Woolworth Co.*, 47 R. I. 165, 131 Atl. 194 (1925) (peanuts in crowded aisle of store long enough to have been "all crushed as though they had been walked over").

there may be direct evidence that the defect existed at a time substantially before the accident.⁴³

This very simple situation has been analyzed in such detail because it represents the prototype of the problem of proof in a wide group of negligence cases. The peculiar difficulties here do not appear where circumstantial evidence affords a direct, one-step inference to conduct which may be called negligent.⁴⁴ Nor do they appear where the defendant is, by statute for instance, under an absolute duty to prevent the condition of things described by the proof (*e.g.*, lack of light in an apartment hallway at night, or on the rear of an automobile on the highway). But where negligence is claimed in the condition of premises, or of a machine or other chattel (*e.g.*, a water main, canned food, or a glass bottle), and often in other cases where conduct is evidenced only circumstantially, these difficulties are present in greater or lesser degree.

Before discussing the so-called doctrine of *res ipsa loquitur*, a word of caution should be said about the limitations within which the discussion in the present article has been carried on. We have been concerned here only with proof of the breach of the standard of care—only *one* of the issues in a negligence case. To recover, a plaintiff must *also* show that the duty to use care was owed by defendant to plaintiff with respect to the general kind of hazard actually encountered. In addition, he must also show injury and the requisite causal connection between negligence and injury. A single line of proof often covers several, or even all, of these issues, as it did in a number of the illustrations offered. But the foregoing analysis dealt only with the negligence point so as to highlight its peculiar problems. The practitioner or student, however, must bear constantly in mind the relationship between the partial and the whole problem.

43. *Ohran v. Yolo County*, 40 Cal. App.2d 298, 104 P.2d 700 (1940) (slipperiness of highway attributable to failure of county to properly surface it dated back to time highway was paved, eight years before accident); *White v. Mugar*, 280 Mass. 73, 181 N.E. 725 (1932) (vegetable leaves on four to six foot space of oiled floor for one hour); *Langley v. F. W. Woolworth Co.*, 47 R. I. 165, 131 Atl. 194 (1925) (peanuts and shells in aisle of store for an hour); *Keen v. Mayor*, 93 Md. 34, 48 Atl. 444 (1901) (hole in sidewalk existing two or three weeks).

44. As in the hypothetical case of the automobile striking the visible pedestrian, given above. And of course these difficulties are absent where there is direct evidence of such conduct.

RES IPSA LOQUITUR

As we have seen, the happening of an accident and a description of some of the facts surrounding it may permit an inference of defendant's negligence without any direct testimony as to his conduct at the very time that such negligence occurred. The case of the automobile hitting the plainly visible pedestrian without a slackening of speed or apparent application of brakes was given as an illustration of this. Another example may be afforded by a case where defendant's intestate borrowed plaintiff's car, and is later found alone dead in it at a railroad grade crossing, where the car and a train had come into collision. No one saw the collision (the fireman being "down on deck, firing"), but the marks on the vehicles show that the automobile hit the left side of the locomotive just behind the trailing truck wheels. It was broad daylight and clear with an unobstructed view down the tracks for a mile. Medical evidence shows the decedent was killed by the collision. There is no court in the land that would not, on such evidence, at least allow the jury to find decedent negligent in a suit by his bailor for destruction of the car,⁴⁵ though the conclusion would rest heavily on inferences from circumstantial evidence. So far as negligence goes, it might aptly be said "the thing speaks for itself." Yet this is not a case that would ordinarily (if ever) be described as a *res ipsa loquitur* case.

The Latin phrase is generally saved for cases where many of the

45. Cases dealing with such a situation practically all involve the issue of the decedent's contributory negligence. The hypothetical case is chosen simply to fit it in to the issue of a defendant's negligence. It is not thought that courts would treat the evidence any more strictly on the negligence issue.

No case involving decedent's contributory negligence in railroad crossing accidents was found in which decedent was so patently negligent as in the example in the text. Cases in which, on somewhat more equivocal evidence, the plaintiff was ruled guilty of contributory negligence as a matter of law include *Allison v. Chicago, M. & St. P. Ry.*, 83 Wash. 591, 145 Pac. 608 (1915) (plaintiff, in automobile whose lights would ordinarily illuminate objects within a radius of 100 feet, and driving it on a cloudy night at a rate which would have enabled him to stop within fifteen feet, ran into side of lighted, moving box car); *Metropolitan v. Chicago, B. & Q. R.R.*, 150 Ill. App. 407 (1909) (decedent, recklessly driving horse on more or less overcast night, ran into side of moving train which could be heard and seen); *Enger v. Ohio & M. Ry.*, 142 Ind. 618, 42 N.E. 217 (1895) (though he was familiar with the crossing and could have seen train from any point on the road within seventy-five yards of the crossing, plaintiff drove his horse down road at steady pace until *horse's head hit against train* which was moving across road at 30 miles per hour. Plaintiff, of course, testified that he was looking out for train, etc. 2 THOMPSON, NEGLIGENCE, § 1672 n. 460 (2d ed. 1901), characterizes this case as "an amazing commentary on human nature.").

important proven facts are pretty general, although the use of the term is far from precise. As it has been put in a series of notes, "in the situation to which *res ipsa loquitur* as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate—which rests on common experience and not on the specific circumstances of the instant case—that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence."⁴⁶ Typical cases are those where machinery breaks or operates in an unusual way,⁴⁷ where a structure or part of it gives way,⁴⁸ where a train is derailed,⁴⁹ where a Coca-Cola bottle bursts,⁵⁰ and so on, where there is no detailed or specific proof pointing to the explanation of the accident. Usually the facts that do appear show that there was probably *some* defect in the instrumentality causing the accident or that *something* went wrong in its

46. Notes, 141 A.L.R. 1016 (1942); 78 A.L.R. 731 (1932); 59 A.L.R. 468, 470 (1929); 1917 E.L.R.A. 4; 6 L.R.A. (N.S.) 337 (1907).

47. *McAllister v. Pryor*, 187 N.C. 832, 123 S.E. 92 (1924) (severe shock suffered during ordinary use of household iron; suit against distributor of electricity); *Kleinman v. Banner Laundry*, 150 Minn. 515, 186 N.W. 123 (1921) (boiler explosion) (see annotation in 23 A.L.R. 484 (1923)); *Illinois Cent. R.R. v. Phillips*, 49 Ill. 234 (1868) (boiler explosion in locomotive).

48. *Gillilan v. Portland Cremation Ass'n*, 120 Ore. 286, 249 Pac. 627 (1926) (fall of marble slab in crematorium); *Hull v. Berkshire Street Ry.*, 217 Mass. 361, 104 N.E. 747 (1914) (trolley pole broke and injured passer by); *Shinn Glove Co. v. Sanders*, 147 Ky. 349, 144 S.W. 11 (1911) (fall of water tank); *Ristau v. E. Frank Coe Co.*, 120 App. Div. 478, 104 N.Y. Supp. 1059 (2d Dep't 1907) (fall of trestle on which plaintiff was working); *St. Louis, I. M. & S. Ry. v. Hopkins*, 54 Ark. 209, 15 S.W. 610 (1891) (wooden sign overhanging sidewalk fell on passer by).

49. *Morgan v. Southern Pacific Co.*, 45 Cal. App. 229, 187 Pac. 74 (1919); *Bourguignon v. Peninsular Ry.*, 40 Cal. App. 689, 181 Pac. 669 (1919); *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N.E. 232 (1907) (streetcar); *Feital v. Middlesex RR.*, 109 Mass. 398, 12 Am. Rep. 720 (1872).

50. *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (collects precedents on both sides of question); *Macon Coca-Cola Bottling Co. v. Crane*, 55 Ga. App. 573, 190 S.E. 879 (1937); *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So.2d 677 (1942); *Grant v. Graham Chero-Cola Bottling Co.*, 176 N.C. 256, 97 S.E. 27 (1918). See cases in which an inference of negligence is not allowed in absence of proof that defect was discoverable: *Loebig's Guardian v. Coca-Cola Bottling Co.*, 259 Ky. 124, 81 S.W.2d 910 (1935); *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743 (1916); *Glaser v. Seitz*, 35 Misc. 341, 71 N.Y. Supp. 942 (Sup. Ct. 1901) (siphon of seltzer water). An early note, 4 A.L.R. 1094 (1919), states that the latter view represents the weight of authority, but it is submitted that proof of the fact of the accident coupled with a showing that the bottle was subjected to neither extreme temperatures nor negligent handling after it left the bottler's control will constitute a *prima facie* case of negligence against the bottler.

operation. But there is also the further question (as in the banana peel case noted above) whether the defect or the injurious operation was reasonably preventable or curable by defendant, and this is the crucial point of *res ipsa loquitur* cases.

Now the doctrine is said to apply only where the facts of the accident which do appear show that the injuring instrumentality is "under the management of the defendant or his servants, and the accident is such as in the *ordinary course of things* does not happen if those who have the management use proper care."⁵¹ [Italics supplied]. And where the probabilities are such that this condition is fully met, the case is equated to any other case where this link in the chain is supplied by circumstantial evidence. Thus where a human toe is found in chewing tobacco,⁵² or a worm in a bottle of soda⁵³ it is hard indeed to escape the imputation of negligence somewhere in the process used by the manufacturer or bottler.⁵⁴ But in many *res ipsa* cases the facts are not nearly so pointed and the adoption of any premise as to the balance of probabilities (*e.g.*, as between forty-nine and fifty-one per cent) is the sheerest "leap of faith." This too is true throughout the whole field of circumstantial evidence, but it is more often and more markedly true in the cases under discussion.

An example will illustrate this difference in degree. A scaffold used by a large contracting company to repair the outside of an apartment house falls and injures an invitee on the private premises below. He sues the contractor. In one case, assume there is no further proof. In another, assume it is shown that one of the wooden supports of the scaffold was rotten and dark colored, and broke without any splinters at all. In the latter case the postulate to be drawn from general experience is that the condition described was probably of long enough standing and was probably obvious enough to people who work with wood, so that it should have been detected by the use of ordinary care and the timber not used as a support for the scaffold. In the former case, however, a genuine quest for

51. *Erle, C.J.*, in *Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, 601, 159 Eng. Rep. 665, 667 (1865).

52. *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918).

53. *Coca-Cola Bottling Co. v. Bennett*, 184 Ark. 329, 42 S.W.2d 213 (1931). See Notes, 4 A.L.R. 1559, 1560 (1919), 47 A.L.R. 149, 153 (1927) and 105 A.L.R. 1039, 1043 (1936) for other extraordinary substances found in bottled beverages.

54. As we have seen this evidence need not point to any specific act or omission.

probabilities would be very much less sure-footed.⁵⁵ Here the postulate must be that scaffolds probably do not fall unless there has been negligence in their construction, maintenance, or use. But this is a fairly complex proposition. Wood, rope, nails, metal braces, hooks, may all be used in a scaffold. A defect (perhaps latent) in any one of them might cause the fall. So might defective workmanship in putting them together. Perhaps, even, young boys tampered with the scaffold when the workmen were away. Scaffolds can generally be put up securely; the case where one falls is highly exceptional. Can it be said that within this highly exceptional group of cases the fall is more often than not due to something that the scaffold builder could prevent by the use of reasonable care? Even if a majority of the theoretically possible causes of scaffold falling might spell negligence, are not most of those probably weeded out by practical scaffold builders, so that the falls that actually do occur represent largely cases of latent defects? The mere fact that the majority of possible explanations involve negligence is not necessarily controlling—it is a matter of the relative frequencies of the different explanations in all of the situations which are like the one defined by the evidence in the present case. These and other questions arise which cast a mantle of serious doubt on the application of the postulate in many cases.⁵⁶

It has been ably argued that there is nothing distinctive about the doctrine of *res ipsa loquitur*; that the cases where it is invoked

55. Thus in *Graham v. Badger*, 164 Mass. 42, 41 N.E. 61 (1895) where injury was caused when a rope broke, Holmes, J., said, "Neither can we assume that the defect, if there was one, was hidden. If the jury were of the opinion that defects in ropes, great enough to make them break under a strain slight in proportion to the normal power of rope generally, can be discovered by proper inspection, we know nothing to the contrary. *It might be otherwise in the case of an iron chain.*" (ital. supplied) *Id.* at 48, 41 N.E. at 61. Perhaps in the very simplest cases men who know little of science, engineering, or mechanics, may be entitled to a common sense guess. But the point is soon reached where such a guess by the uninformed would be worthless to anybody really concerned with getting at the truth of the matter. Yet courts have not hesitated to postulate the probabilities in case after case where the complexity of the problem would stump experts—and usually without any insistence on hearing what the experts have to say. Where this is true, the adoption of the postulate is not compelled by logic or any knowledge of physical things commonly held from broad human experience. To treat such cases as involving nothing but the rules of circumstantial evidence is to stress the form and miss the substance.

56. The fallacy in relying on "common knowledge" to label as "negligent" defendants' conduct in complicated accident cases which are not commonly experienced is noted in *Morris, Res Ipsa Loquitur in Texas*, 26 TEX. L. REV. 257, 262 (1948).

represent simply an application of well recognized principles of inference and circumstantial proof, and that the use of the Latin tag brings only confusion and should be consigned to oblivion.⁵⁷ In a formal sense, it is no doubt true that the logic used in *res ipsa loquitur* cases is the same as that in all cases of circumstantial evidence. And, as we have seen in all cases, this logic depends in its application on the assumption or rejection of postulates as to probabilities which are often very doubtful. In a system where the adoption of an agnostic position will deny recovery to the accident victim (who has the burden of proof) the practical impact and importance of *res ipsa loquitur* has probably consisted in its tendency to invite or encourage the assumption of broad and doubtful postulates favorable to liability in many situations where the courts would otherwise be understandably reluctant to adopt them, at least without the aid of expert opinion.⁵⁸ If the foregoing is true, the persistence and expansion of the "doctrine"⁵⁹—in spite of trenchant and penetrating logical criticism—may well be attributable to the strong general trend to-

57. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 258 (1936) and *Res Ipsa Loquitur in California* 37 CALIF. L. REV. 183, 184, 232, 234 (1949).

58. This process has been aided by the tendency of the doctrine to focus attention on the fact that carefully made and operated appliances do not in the vast majority of instances cause injury and to obscure the inquiry whether the majority of the accidents which occur are due to negligence. See, e.g., the court's reasoning in *Rose v. Stephens & Condit Transp. Co.*, 11 Fed. 438 (C.C.S.D. N.Y. 1882) (boiler explosion); *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020 (1893) (explosion). It would not take much of an extension of this line of reasoning to afford an inference of negligence in all accident cases.

59. The trend has been for the courts to become progressively more liberal in adopting postulates favoring liability. This is dramatically shown by comparing a statement made in 1902 with the state of the law at present. In *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 105, 53 Atl. 665, 667 (1902), the court said: "It has been held in a number of cases that the sudden breaking of machinery is not sufficient, of itself, to warrant the court in sending the case to a jury. Thus the mere fact of the breaking of a chain, *Brymer v. Southern Pacific Co.*, 90 Cal. 496, 27 Pac. 371 (1891); the unexplained bursting of an emery wheel, *Simpson v. Pittsburgh Locomotive Works*, 139 Pa. 245, 21 Atl. 386 (1891); the parting of a brake chain on a car, *Sack v. Dolese*, 137 Ill. 129, 27 N.E. 62 (1891); the bursting of a fly-wheel, *Piehl v. Albany Ry.*, 30 App. Div. 166, 51 N.Y. Supp. 755 (3d Dep't 1898); the breaking of a car wheel from some cause unknown, *Morrison v. Phillips-Colby Construction Co.*, 44 Wis. 410 (1878); the breaking of a derrick, *Duffy v. Upton*, 113 Mass. 544 (1873), were held not sufficient to justify an inference or presumption of negligence." There is probably not a single one of these situations that most courts today would not bring within the ambit of *res ipsa loquitur*. For example, see the following:

Mere breaking of chain: *Johnson v. Pickering Land & Timber Co.*, 132 La. 425,

wards strict liability and social insurance—a trend which is corroding a system of liability nominally based on fault.⁶⁰ This would also account for the greater readiness to invoke the doctrine in certain kinds of situations, and within certain relationships, where the pull towards absolute liability has been particularly strong, or where the accident victim's burden of proof has been particularly forbidding.

The explanation here offered would also mean that a very significant aspect of the doctrine has been in meeting problems of sufficiency of proof, that is in getting cases to the jury. And since

61 So. 514 (1913) (pulley belt broke at place where defendant had repaired it); *Golden v. Mannex*, 214 Mass. 502, 101 N.E. 1081 (1913) (cable used in hoisting stone broke).

Unexplained bursting of machinery: *Lippert v. Pacific Sugar Co.*, 33 Cal. App. 198, 164 Pac. 810 (1917) ("preheater" used in heating sugar beet juices exploded); *Central of Georgia Ry. v. Butler*, 8 Ga. App. 243, 68 S.E. 956 (1910) (explosion of gas tank).

Brake or other failure in automobile: *Clarke v. Cardinal Stage Lines*, 139 Kan. 280, 31 P.2d 1 (1934) (front axle of bus broke); *Perry v. Pickwick Stages*, 117 Ore. 598, 243 Pac. 787 (1926) (failure of brakes to work at critical time is "some evidence" of negligence and warrants refusal of motion for nonsuit; *res ipsa loquitur* not mentioned).

Failure of automobile wheel: *Jianou v. Pickwick Stages System*, 111 Cal. App. 754, 296 Pac. 108 (1931) (wheel on "auto stage" broke); *Gates v. Crane Co.*, 107 Conn. 201, 139 Atl. 782 (1928) (wheel of truck became detached and struck plaintiff on sidewalk); *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016 (1910) (wheel came off truck).

Breaking of derrick: *Gorman v. Milliken*, 42 Misc. 336, 86 N.Y. Supp. 699 (Sup. Ct. 1904), *aff'd without opinion*, 102 App. Div. 617, 92 N.Y. Supp. 1126 (2d Dep't 1905) (bare fact of fall of derrick is *prima facie* evidence of negligence); *cf.* *Pearl City Packet Co. v. Towery*, 184 Ark. 966, 43 S.W.2d 1086 (1931) (*res ipsa loquitur* not mentioned but jury allowed to find for plaintiff injured by falling derrick despite lack of evidence pointing to specific cause of the fall).

Of course, the extension of *res ipsa loquitur* into new fields is not due solely to the influence of the trend toward stricter liability. Within the confines of common law negligence courts may infer negligence and impose liability more frequently because, as complicated manufactured articles achieve greater perfection, it becomes increasingly probable that an otherwise unexplained mishap is attributable to negligence on the part of the manufacturer or the person in control at the time.

60. For an astute, early appraisal of the role of *res ipsa loquitur* in furthering this trend, see Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 344, 367 (1914). Recent indications of the trend are described in James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); Searl, *Automobile Liability Law Development & Trend*, 39 BEST'S INS. NEWS 583 (Fire & Cas. ed., 1938).

juries incline heavily towards plaintiffs (especially in cases like these⁶¹) the net practical effect of the doctrine is to shift the substantive burden of loss from unexplained accidents of these types from plaintiffs to defendants.

As usually stated the conditions for the application of the doctrine are three:⁶² (1) "The accident must be one that ordinarily would not occur in the absence of negligence,"⁶³ or as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use; (2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part. A fourth condition is sometimes stated, that knowledge of the causes of the injury must be more accessible to defendant than plaintiff.⁶⁴ We shall discuss these in order.

1. *Accident Would Not Ordinarily Occur Without Negligence.*

The first requirement is absolutely essential to the logic of the doctrine, as we have seen. We have also seen that the propriety of assuming the postulate is clear enough under the facts of some cases. This is apt to be true when the evidence shows a good many of the specific facts about the accident⁶⁵ or if these involve "an element of drama and of the freakish and improbable."⁶⁶ Oft-cited instances are the human toe in chewing tobacco⁶⁷ and the street car that entered plaintiff's restaurant uninvited.⁶⁸ The clearer the probabilities, the less the need for resort to any special doctrine. But the doctrine is

61. The general tendency of juries in negligence cases has often been noted. See, e.g., James, *Functions of Judge or Jury in Negligence Cases*, 58 YALE L.J. 667, 686 (1949). For some indication of the situation in *res ipsa* cases, see n. 150, *infra*.

62. 9 WIGMORE, EVIDENCE, § 2509.

63. Malone, *Res Ipsa Loquitur*, 4 LA. L. REV. 70, 76 (1941).

64. Carpenter, *Res Ipsa Loquitur in California*, 10 SO. CALIF. L. REV. 166, 169 (1937).

65. See Malone, *Res Ipsa Loquitur*, 4 LA. L. REV. 70, 73, 74 (1941). Particularly in automobile accident cases the circumstances are often so fully shown that reliance upon the *res ipsa loquitur* doctrine is unquestionably legitimate, albeit somewhat unnecessary. See, e.g., Nicol v. Geidler, 188 Minn. 69, 247 N.W. 8 (1933); Johnson v. Herring, 89 Mont. 420, 300 Pac. 535 (1931); Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 221, 282 Pac. 1009 (1929); Hamburger v. Katz, 10 La. App. 215, 120 So. 391 (1928).

66. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 192 (1949). See also Malone, *Res Ipsa Loquitur*, 4 LA. L. REV. 70, 79 (1941).

67. Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

68. Armstrong v. New Orleans Public Service, Inc., 188 So. 189 (La. App. 1939).

probably more often invoked in practice in run of the mill occurrences where the facts of the occurrence before the courts are meager. A chain, a cable, or a hook breaks,⁶⁹ a structure collapses,⁷⁰ a boiler explodes,⁷¹ plaster falls,⁷² a foreign substance is found in canned, baked, or bottled food,⁷³ a water main bursts,⁷⁴ and as a result plaintiff is injured. It is here the doctrine is most sorely needed and it is here that the postulates as to probabilities are most often doubtful since most machines and appliances simply are not foolproof, even when made and kept and used with reasonable care.⁷⁵ By and large courts have been pretty liberal in responding to this need, though undoubtedly they have done so only where there is a fair chance that the probabilities are as they assume. Moreover they have been willing to adopt the needed postulate in the widest variety of situations without requiring expert testimony as to the balance of probability.⁷⁶ Thus the Minnesota court has said:

... Boilers sometimes explode. Comparing the number of explosions with the extent of the use of boilers, explosions are not frequent. If they are kept in proper condition and repair, and if they are oper-

69. *Golden v. Mannex*, 214 Mass. 502, 101 N.E. 1081 (1913) (cable).

70. *Suko v. Northwestern Ice & Cold Storage Co.*, 166 Ore. 557, 113 P.2d 209 (1941); *Katz v. Goldring*, 237 App. Div. 824, 260 N.Y. Supp. 796 (2d Dep't 1933).

71. *Kleinman v. Banner Laundry*, 140 Minn. 515, 186 N.W. 123 (1921); *Illinois Central R.R. v. Phillips*, 49 Ill. 234 (1868) (*res ipsa loquitur* not mentioned).

72. *Windas v. Galston & Sutton Theatres*, 35 Cal. App. 533, 96 P.2d 170 (1939); *Gillilan v. Portland Cremation Assn.*, 120 Ore. 286, 249 Pac. 627 (1926) (fall of marble slab from wall).

73. *Paslinelli v. Dainty Foods Mfrs.*, 322 Ill. App. 586, 54 N.E.2d 759 (1944) (bone in soup); *Albany Coca-Cola Bottling Co. v. Shiver*, 63 Ga. App. 755, 12 S.E.2d 114 (1940) (particles of glass in bottled beverage).

74. *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941).

75. As machines and appliances become perfected there is greater reason for assuming they will not cause injury unless there is negligence. See n. 59, *supra*.

See also, suits arising from train derailments caused by rail breakages attributable to transverse fissures. For many years such fissures were latent and undiscoverable, and when proved as the cause of an accident, the law generally required a verdict for the carrier. *Chesapeake & Ohio R.R. v. Baker*, 149 Va. 549, 140 S.E. 648 (1927). Since just before World War II, however, when the "Sperry car" was invented, such fissures have been discoverable.

76. The requirement of such evidence would generally be an obstacle to plaintiff, though not so severe a one as it is in medical malpractice cases, where the requirement of expert testimony as to the standard of conduct generally defeats the application of *res ipsa loquitur* except in cases where laymen are thought to be competent to pass judgment. See analysis in Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 210 *et. seq.* (1949). In *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944); 93 Cal. App. 2d 43, 208 P.2d 445 (1949) the doctrine was applied in favor

ated properly, explosions are unusual. Whether the *res ipsa* doctrine, which permits an inference of negligence from the fact of an explosion, should apply is largely a question of how justice in such cases is most practically and fairly administered. There is nothing legally illogical in permitting the inference to be drawn. Usually the party injured is without information upon which he may with certainty allege the exact cause, and is without direct proof. Perhaps the exact cause is incapable of ascertainment. The actual proof, if any, is with the party having the management of the instrumentality. These are practical considerations. We think the jury should have been permitted to draw an inference of negligence of the laundry company from the occurrence of the explosion. Though the holding may put us with the minority, we are content with it.⁷⁷

Expert evidence along this line is clearly admissible⁷⁸ although courts have occasionally disparaged its value.⁷⁹ As a practical matter, however, it has seldom been introduced by a plaintiff, and usually does not appear in these cases at all.⁸⁰

Res ipsa loquitur was most often invoked in early cases by a passenger against a carrier.⁸¹ It was contended, occasionally⁸² and for the

of a patient who suffered a traumatic injury to his shoulder while unconscious during an appendectomy.

It is not suggested that in the present state of the law the plaintiff should always (in a *res ipsa loquitur* case) introduce expert evidence on the issue of negligence. Where plaintiff is sure the court will invoke the doctrine, the introduction of such evidence would serve only to alert the court to the dangers of the leap of faith which it was fully prepared to make without a second thought. But where it appears that the court is quite likely to ponder the legitimacy of the inferences to be drawn or is likely to refuse to apply the doctrine in the case, the introduction of favorable expert testimony might well be very helpful.

77. *Kleinman v. Banner Laundry Co.*, 150 Minn. 515, 517, 518, 186 N.W. 123, 124 (1921).

78. *McCray v. Galveston, H. & S. A. Ry.*, 89 Tex. 168, 34 S.W. 95 (1896).

79. *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020 (1895). This attitude suggests that the court was not really concerned so much with examining the probabilities of negligence as with fixing liability for injury from a dangerous activity.

80. *Morris, Res Ipsa Loquitur in Texas*, 26 Tex. L. REV. 257 (1948) takes the view that wherever expert opinion might shed light upon the matter of probability, general or common knowledge should not be relied upon.

81. *Gritsch v. Pickwick Stages System*, 131 Cal. App. 774, 784, 22 P.2d 554, 558 (1933): "Originally the doctrine was applicable only in cases against common carriers."; and *Crozier v. Hawkeye Stages, Inc.*, 209 Iowa 313, 318, 228 N.W. 320, 322 (1929): "The rule of *res ipsa loquitur* has been recognized as of peculiar application in actions for negligence against carriers of passengers".

82. *Griffen v. Manice*, 166 N.Y. 188, 192-93 59 N.E. 925, 926 (1901) ("... it is argued that the principle which usually passes under the name of '*res ipsa loquitur*'

most part unsuccessfully, that the doctrine was limited to such a relationship. Another limitation, which courts did frequently impose, excluded the doctrine from master and servant cases. It is now clear that the doctrine is not limited to any particular relationship.⁸³ Relationship may, however, have some bearing on the applicability of the doctrine. In the first place, the relationship may be one that calls for great care. Where that is so, it affects the problem in two ways. (1) It affects the matter of probability. Wherever liability attaches more frequently, "the inference of negligence becomes all the easier to draw. As the precautions that the defendant must take to avoid injury increase there is a proportionate increase in the number of available hypotheses involving carelessness."⁸⁴ It should be noted that this reasoning applies not only where there is a relationship which calls for great care, but whenever the dangerous nature of the defendant's conduct calls for commensurately great precautions. This does not mean (logically) that an inference of negligence may be drawn in all cases calling for great care, but that it may be more easily drawn from facts that otherwise might be regarded as equivocal.⁸⁵ (2) In addition to the matter of probabilities as it would be revealed to an all seeing eye, where the relationship calls for great care, that fact reflects a policy of stricter liability which in turn is likely to be reflected in a greater readiness of courts, in doubtful cases, to make an assumption of probabilities which favors liability. That is to say, where for some reason extraneous to the mere matter of probability there is a policy in favor of recovery, doubtful questions of probability are more likely to be decided in favor of a plaintiff.

applies only to cases where the relation between the parties is the contractual one of carrier or bailee . . . in my judgment it is unfounded . . ."); and see *Brown v. Davis*, 84 Cal. App. 180, 257 Pac. 877 (1927).

83. *Barger v. Chelpon*, 60 S.D. 66, 71, 243 N.W. 97, 98-99 (1932) ("The doctrine has been more frequently applied in cases against carriers of passengers than in any other class, but it has been held that there is no foundation for the limitation of the rule. The doctrine originates from the nature of the act, not from the nature of the relation between the parties . . ."); and see *Rose v. Stephens & Condit Transp. Co.*, 11 Fed. 438 (C.C.S.D.N.Y. 1882) (same).

84. *Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 78 (1941).

85. Prosser finds it hard to appreciate this reasoning, but it is difficult to appreciate his difficulty. See *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 206 (1949) and *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980, 989-90 (1936).

The converse of this is also true. Some relationships do not even call for reasonable care (e.g., that between landowner and unknown trespasser,⁸⁶ that between driver and guest,⁸⁷ under some statutes). In such a case an inference of negligence would not help plaintiff. In other relationships the duty to use care is so limited that the probabilities of a breach of duty to plaintiff are seriously cut down. Thus in *Galbraith v. Busch*,⁸⁸ plaintiff was injured when an automobile in which she was riding as a guest suddenly swerved from the highway and hit a tree. In her suit against the driver, and also against the owner, no further evidence appeared. In reversing a plaintiff's judgment (entered upon a verdict) the New York Court of Appeals was willing to assume that these circumstances, unexplained, justified an inference of negligence either in the operation or in the maintenance of the automobile. The court conceded that if defendants owed plaintiff the duty to exercise reasonable care both in the operation and in the maintenance of the car, the doctrine of *res ipsa loquitur* might apply. Since, however, the guest assumed the risk of defects in the car not actually known to defendants, the doctrine did not warrant recovery, even though the guest was owed the duty of due care with respect to operation. "The evidence, though unexplained, cannot possibly lead to an inference that the accident was due to lack of care in the operation of the automobile, for the probability that it occurred from a break in its mechanism is at least equally great."⁸⁹

2. *Defendant Had Exclusive Control of Injuring Agency.* The second requirement for *res ipsa loquitur* is commonly stated in terms of defendant's exclusive control of the injuring agency. The logical basis for this requirement is simply that it must appear that the negligence of which the thing speaks is probably that of defendant and not of another. Viewed in this light the requirement of proof of exclusive control is immediately seen to impose too strict a burden upon plaintiffs. Exclusive control may have the requisite logical tendency, but there are also many other ways (not involving exclusive control) in which the probable negligence can be attributed to defendant. And in fact the courts do not generally apply this re-

86. RESTATEMENT, TORTS § 333 (1934).

87. PROSSER, TORTS 259, 260 (1941).

88. 267 N.Y. 230, 196 N.E. 36 (1935).

89. *Id.* at 235, 196 N.E. at 39.

quirement as it is literally stated, although mechanical insistence upon it has brought about an occasional restrictive result.⁹⁰ The requirement as it is generally applied is more accurately stated as one that the evidence must afford a rational basis for concluding that the cause of the accident was probably "such that the defendant would be responsible for any negligence connected with it."⁹¹ That does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at the defendant's door. Here again, as in the case of the first requirement, there is wide range for judicial guesswork about relative probabilities. Thus in *Fallo v. New York, N.H. & H. R.R.*,⁹² where a traveler on the highway near the tracks was struck by a bolt when a train passed, the court conceded that an outsider might have thrown the bolt or put it on the track so that it was "hurled by the passing train," but left it to the jury to say whether it was not more probable that it came from the braking mechanism of the passing train.⁹³

The fallacy of the "exclusive control" test is seen in many situations where the doctrine is unhesitatingly applied despite absence of "control." Where for instance the defendant's duty of care with respect to the injuring agency is (as to the plaintiff) non-delegable, the fact that control may have been in an independent contractor will not preclude the application of the doctrine.⁹⁴ And there are

90. *Boston & M. R.R. v. Jesionowski*, 154 F.2d 703 (1st Cir. 1946) (where derailment might have been caused by deceased's improperly throwing a switch, or by conditions indicating railroad's negligence, doctrine held inapplicable *even where jury had rejected possibility of deceased's negligence*, since "the instrumentality, which was involved in the damaging accident, was not under exclusive control of . . ." defendant), *rev'd*, *Jesionowski v. Boston & M. R.R.*, 329 U.S. 452 (1947). See note 120, *infra*. *Bluett v. Eli Skating Club*, 133 Conn. 99, 48 A.2d 557 (1946) (roller skater injured when skate rented from rink operator came off shortly after rink attendant had fastened it in place; doctrine held not applicable because "control by the defendant has been supplanted by active actual control in the plaintiff."); *Kilgore v. Shepard Co.*, 52 R.I. 151, 158 Atl. 720 (1932) (plaintiff, customer in defendant's store, sat down in chair which collapsed; application of *res ipsa loquitur* refused on ground that "the thing occasioning the injury was not under defendant's control.")

91. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 201 (1949).

92. 123 Conn. 81, 192 Atl. 712 (1937).

93. Contrast *Missouri, K. & T. Ry. v. Jones*, 103 Tex. 187, 125 S.W. 309 (1910) where the court came to the opposite conclusion about the presence of a bolt near the track in a railroad yard.

94. *Motor Sales & Service, Inc. v. Grasselli Chemical Co.*, 15 La. App. 353, 131 So. 623 (1930) (owner of drum of acid held liable under *res ipsa loquitur* doctrine not-

many situations where "it is clear that 'control' is simply the wrong word."⁹⁵ Where a fuse misfires,⁹⁶ or a bottle explodes,⁹⁷ the inference of negligence may still point to the manufacturer or bottler if the proof eliminates the probability of other causes, even though the mishap occurs at a time and place remote from defendant's control.

The requirement as restated may still be a pretty serious burden in some situations. In the case of the misfiring fuse or the exploding bottle, for instance, if the article has passed through many hands the plaintiff must (by direct or circumstantial evidence) lay the basis for eliminating *each one* of them as a likely cause of the defect, before he can recover against the manufacturer.⁹⁸ And even where the person in control of the instrument at the time of injury is sued, the possibility that some predecessor in control or some intermeddler caused the defect may still exist, though it may not be strong enough to destroy the needed inference⁹⁹ and in any event it will not help a defendant who had a duty to inspect if the defect was probably discoverable and existed long enough to be found.¹⁰⁰

withstanding that at time cap blew off and contents damaged plaintiff's automobile, drum was being transported by an independent drayman). And of course it is too clear for argument that control by defendant's employee, joint entrepreneur, etc., will satisfy the requirement; see Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 199 (1949).

95. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 200 (1949).

96. *Jump v. Ensign-Bickford Co.*, 117 Conn. 110, 167 Atl. 90 (1933).

97. *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S.E. 1087 (1912).

98. The nature of the defect itself may show this (e.g., snail in bottle) and this was found to be the case with the misfiring fuse, note 96, *supra*. But where the defect itself is not shown (save as the occurrence indicates there probably was *some* defect) this is seldom the case, so that each intermediate handler must be accounted for. Upon such a showing, *res ipsa loquitur* was applied in *Hoffing v. Coca-Cola Bottling Co.*, 87 Cal. App.2d 371, 197 P.2d 56 (1948) (explosion of bottle) and *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga. App. 762, 73 S.E. 1087 (1912) (similar). Where such evidence as to intermediate handlers was lacking, the court refused to apply *res ipsa loquitur* in *Gerber v. Faber*, 54 Cal. App.2d 674, 129 P.2d 485 (1942) (explosion of bottle); *Gibbs v. General Motors Corp.*, 350 Mo. 431, 166 S.W.2d 575 (1942) (brakes failed to work properly after plaintiff had automobile for two months and had driven it 1,530 miles); and *Dunn v. Hoffman Beverage Co.*, 126 N.J.L. 556, 20 A.2d 352 (1941) (similar).

Of course the proof need not *demonstrate* that all the other handlers were innocent provided only it affords the basis of a legitimate inference to that effect.

99. As in *Fallo v. New York, N.H. & H. R.R.*, 123 Conn. 81, 192 Atl. 712 (1937).

100. See *Kaplan v. Grand Department Stores, Inc.*, 118 Conn. 714, 174 Atl. 76 (1934) (bulge in mat at top of stairway in defendant's store came about through "wear extending over a considerable time"); *Hudson v. F. W. Woolworth Co.*, 275 Mass.

An interesting question arises when several defendants are sued and the proof affords an inference of negligence on the part of one of them but does not afford a basis for saying that it was more probably one of them than the others.¹⁰¹ Orthodox reasoning would lead to the conclusion that plaintiff has not met his burden of proof as to any of the defendants¹⁰² and that it is not therefore incumbent on any of them to come forth with an explanation. Thus the rigors of the present requirement (even as restated) could not be circumvented by joining in the suit all those whose negligence could not be eliminated by some proof. Clearly a rule like this may easily put an obviously wronged and obviously innocent plaintiff in a hopeless predicament. It would mean, for example that an appendectomy patient who suffered traumatic injury to his shoulder while unconscious during the operation could not recover against any one of the six doctors or nurses who participated in the operation (all acting independently) without showing affirmatively which one probably injured him.¹⁰³ This harshness has been sought to be justified, however, by pointing out that the alternative seeks to pin fault, and so liability, upon a group *en masse*.¹⁰⁴ In a society like ours which

269, 176 N.E. 188 (1931) (appearance of candy and floor around it indicated it had been in aisle of defendant's store for some time); *Anjou v. Boston Elevated Ry.*, 208 Mass. 273, 94 N.E. 386 (1911) (appearance of banana peel on platform in defendant's railroad station led court to similar conclusion).

101. *Estes v. Estes*, 127 S.W.2d 78 (Mo. App. 1939) (guest in automobile sues for injuries received in head-on collision between it and another automobile); *Yellow Cab Co. v. Hodgson*, 91 Colo. 365, 14 P.2d 1081 (1932) (passenger in taxicab sues cab owner and driver of other automobile which collided with it); *Harrison v. Sutter St. Ry.*, 134 Cal. 549, 66 Pac. 787 (1920) (suit against street car company and owner of wagon which collided, killing passenger in street car). Cf. *Smith v. Claude Neon Lights, Inc.*, 110 N.J.L. 326, 164 Atl. 423 (1933) (both independent contractor responsible for maintenance of sign and owner of building on which sign was erected held to be in control and possession of sign and to be liable under *res ipsa loquitur* when part of sign became detached and fell on passer by).

102. This assumes that each defendant's possible liability is independent of that of at least some of the others. If the relationship between defendants is such that all would be liable, vicariously or otherwise, a different situation would of course be presented.

103. See *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944); 208 P.2d 445 (Cal. Dist. Ct. App. 1949).

104. This was defendants' argument, *inter alia*, in *Ybarra v. Spangard*, *supra* note 103. See also Seavey, *Comment: Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643, 648 (1950): "It is not equitable to impose liability upon all the members of a group where it is evident that the harm was not a result of group action and that most

values so highly the worth of the individual, this is a serious matter. Anything like a finding of guilt or the imposition of punishment or personal civil liability must be done on an individualized basis or there will be a serious threat to individual rights. But the objection would lose its force under a system of liability in which accident victims were compensated without regard to fault and the losses spread over society according to the principles of insurance. In some types of situations where liability insurance is available and widely held, we are approaching just such a result in practice. And even though fault is still generally required, there is no injustice in holding a group of insured defendants liable where one of them is shown to be at fault, since this group is but part of the larger group of those among whom such losses would be spread even if the proof were to pin the fault on a single insured individual. This is no retreat from individualizing the finding and treatment of fault, but rather a retreat from insistence upon fault (in accident law) and from the fiction that damage claims are paid out of the pockets of individual wrongdoers. It is simply a recognition both of the fact and the desirability of spreading accident losses according to the principles of insurance. Elsewhere in the law, where fault plays no significant role, liability has been treated similarly. Thus where there is damage to goods in transit over the lines of several carriers, there is a presumption it was caused by the terminal carrier¹⁰⁵ (by whom it is then invariably distributed among all the carriers involved, unless the damage can be traced to one line). Although such considerations were not expressly mentioned, they may well have played a significant part in a recent California decision which allowed recovery against all six of the doctors and nurses in the appendectomy case described above.¹⁰⁶

Vehicle collision cases have given considerable trouble under both

of the members of the group were innocent of wrongdoing." Cf. also Peairs, *The God in the Machine*, 29 B.U.L. REV. 37, 75 (1949).

105. This was the common law rule. 3 HUTCHINSON ON CARRIERS (3d ed. 1906) § 1348; 1 ROBERTS, FEDERAL LIABILITIES OF CARRIERS (2d ed. 1929) § 387; *Chicago & N. W. Ry. v. Whitnack Produce Co.*, 258 U.S. 369 (1922). Under existing federal legislation either the initial or the delivering carrier may be held liable by the holder of the bill of lading but may recover over against the carrier on whose line the damage occurred. 49 U.S.C.A. § 20, pars. (11) and (12) (1929).

106. *Ybarra v. Spangard*, note 103, *supra*. In a comment criticizing the case along the lines suggested in the text, Professor Seavey concludes with the comment (in a

of the first two requirements of the doctrine (which in fact are often interrelated). Where two moving vehicles (A's and B's) are involved and nothing more appears than the fact of collision there are four possible explanations: (1) Both A and B were negligent; (2) both were free from negligence; (3) A alone was negligent; (4) B alone was negligent. Where A sues B, only the last explanation would warrant a recovery. Courts have consistently declined to apply the doctrine in such a case. It certainly cannot be said that the fourth explanation is more probable than all the others (quite the reverse is true), and A has not shown exclusive control of the instrumentalities by B—he himself has shared it.¹⁰⁷ Where the suit is brought by C (either a by-stander or a passenger in one of the vehicles) against B alone, most courts also deny application of *res ipsa loquitur* (unless B is a common carrier and C its passenger),¹⁰⁸ even though C eliminates his own negligence as a probable explanation.¹⁰⁹ Here only two (the first and last) of the explanations warrant recovery. But while this is only half of the possible explanations, it does not follow that they represent only fifty per cent of the probabilities. It is entirely conceivable that the first explanation occurs throughout collision cases with the greatest frequency of the four (though the courts do not seem to have referred to whatever statistical data there are on the point).¹¹⁰ If it does, the balance of prob-

footnote): "We perhaps should not overlook the fact that very likely the doctors and hospitals were insured and that the ultimate loss would be borne by an insurance company." Seavey, *Comment: Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643, 648, n. 15 (1950).

107. A preferable statement of this would be that A has failed to show that B's negligence is a more probable cause of the injury than his own.

108. See text and note 112 *infra*.

109. Hot Springs St. Ry. v. Hildreth, 72 Ark. 572, 82 S.W. 245 (1904); Diamond v. Weyerhaeuser, 178 Cal. 540, 174 Pac. 38 (1918); cf. Harrison v. Sutter St. Ry., 134 Cal. 549, 66 Pac. 787 (1901) (passenger sued owners of both vehicles). But see the more recent California case of Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165 (1934) (criticized by Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 207 (1949)).

Of course, the case for refusal to apply the doctrine is pretty clear where C is a moving pedestrian and his own care is not affirmatively shown.

110. Prosser's estimate of the probabilities agrees with the proposition in the text. See *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980, 992-93 (1936); *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 207 (1949).

Some statistical data have been compiled showing that more than two-thirds of the drivers involved in urban two-vehicle collisions were reported as violating a traffic regulation. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 56 (1946 ed.); *Id* at

abilities lies with plaintiff in such a case, though no court seems yet to have come to such a conclusion.¹¹¹ If B is a common carrier, however, about half the courts that have decided the matter apply the doctrine in favor of B's passenger.¹¹² Whether this is a result of policy or probability, it seems eminently sound.

If C sues both A and B (neither being C's carrier), then the case against each defendant stands precisely as did C's case against B alone in the last paragraph. The probability that *both* defendants were free from negligence is, however, patently less than the probability that either one or the other or both were negligent. Therefore, if

56 (1947 ed.). These figures are based on reporting which is not too reliable ("There is considerable variation in the reporting of the different states. . . ." *Id.* at 55 (1947 ed.)). Nor do these figures show the distribution of drivers at fault among cases where only one of the participants violated regulations and where both did. Moreover they do not appear to take account of common law negligence. (In this respect see the tables in KIRBY, A STUDY OF MOTOR VEHICLE ACCIDENTS IN CONNECTICUT 32 (1927 ed.); *Id.* at 20 (1928 ed.); *Id.* at 35 (1929 ed.), which allocates the entire blame for automobile accidents resulting from skidding, miscalculation, or inexperience to the driver. For the law regarding the first of these see the text, *infra* note 117.)

Even the National Safety Council no longer publishes statistics in terms of driver violations in two-vehicle collisions. See ACCIDENT FACTS, 1948 and 1949 editions.

111. Apparently no court has decided that a two-vehicle collision indicates that more probably than not the operators of both were negligent, in the absence of evidence of the conduct of the drivers before the accident.

112. The fact that one of the defendants is a common carrier would logically make no difference except where its passenger is suing.

In *Capital Transit Co. v. Jackson*, 149 F.2d 839 (D.C. Cir.), *cert. denied*, 326 U.S. 762 (1945) (decision reviewing divergent authorities); *Pickwick Stages Corp. v. Messenger*, 44 Ariz. 174, 36 P.2d 168 (1934); *Preston v. Des Moines Ry.*, 214 Iowa 156, 241 N.W. 648 (1932); *Kilgore v. Brown*, 90 Cal. App. 555, 266 Pac. 297 (1928); *Shay v. Camden & S. Ry.*, 66 N.J.L. 334, 49 Atl. 547 (1901); and *Loudoun v. Eighth Ave. R.R.*, 162 N.Y. 380, 56 N.E. 988 (1900); *res ipsa loquitur* was applied to the carrier but not to the owners of the other vehicle. Cf. *Thibodeaux v. Star Checker Cab Co.*, 143 So. 101 (La. App. 1932) (passenger sued carrier and driver of automobile with which it collided and recovered against both; *res ipsa loquitur* applied against carrier and plaintiff sustained burden of proving negligence of other driver as in ordinary damage suit).

Cases holding neither driver liable under *res ipsa loquitur* (*i.e.*, treating carrier the same as other driver or owner): *Riggsby v. Tritton*, 143 Va. 903, 129 S.E. 493 (1925); *McNiff v. Boston Elevated Ry.*, 234 Mass. 252, 125 N.E. 391 (1919); *Union Traction Co. v. Mann*, 72 Ind. App. 50, 124 N.E. 510 (1919); *Blew v. Philadelphia Rapid Transit Co.*, 227 Pa. 319, 76 Atl. 17 (1910); *Wolf v. Chicago Union Traction Co.*, 119 Ill. App. 481 (1905).

See also Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980, 984-85 (1936) and Notes, 25 A.L.R. 690 (1923) and 83 A.L.R. 1163 (1933).

the reasoning of the California court in *Ybarra v. Spangard*¹¹³ is applied here, it should be held that a prima facie case is made out against both defendants. Such a result has occasionally been reached.¹¹⁴

Where defendant's moving vehicle runs off the highway or collides with a properly parked car, there is considerable authority that the doctrine applies, though even here, if nothing more appears, the probabilities are doubtful, and this is reflected by some conflict in the cases.¹¹⁵ On the other hand, the mere showing that the defendant's automobile has run into a pedestrian has repeatedly been held to give rise to no inference of negligence.¹¹⁶ Similarly, it is generally held that the mere fact of an automobile's skidding on slippery highway is not necessarily evidence of negligence and that in such cases the doctrine of *res ipsa loquitur* has no application.¹¹⁷ But where an

113. 25 Cal. 2d 486, 154 P.2d 687 (1944), *aff'd*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949).

114. *Overstreet v. Ober*, 14 La. App. 633, 130 So. 648, 650 (1930) ("The two vehicles collided. . . . Someone was negligent. *Res ipsa loquitur*. The plaintiff having alleged that each defendant was negligent, the purpose of the trial was to ascertain whether each was negligent, and, if not, which one." *Res ipsa loquitur* was not essential to decision, however, and only one driver was found negligent.) *Kansas City, F. S. & M. R.R. v. Stoner*, 49 Fed. 209 (8th Cir. 1892) (action by passenger against two railroad companies whose trains collided in broad daylight at a crossing; court finds presumption of negligence applies to both defendants and approves denial of instruction that the railroad not carrying the plaintiff was not affected by this presumption).

115. *Res ipsa loquitur* applied: vehicle runs off road: *Chaisson v. Williams*, 130 Me. 341, 156 Atl. 154 (1931); *Scott v. Checker Cab Co.*, 12 La. App. 598, 126 So. 241 (1930) (same); *Iannuzzi v. Bishop*, 8 N.J. Misc. 609, 151 Atl. 477 (D.C. 1930); *Brandes v. Rucker-Fuller Desk Co.*, 102 Cal. App. 221, 282 Pac. 1009 (1929) (hit pedestrian on sidewalk). Vehicle collides with parked car: *Hendler v. Coffey*, 278 Mass. 339, 179 N.E. 801 (1932); *Slappey v. Schiller*, 116 Cal. App. 274, 2 P.2d 577 (1931); *Oppenheimer v. American Ry. Exp. Co.*, 181 N.Y. Supp. 195 (Sup. Ct. 1920).

Compare the following cases in which application of *res ipsa loquitur* was refused:

L'Ecuyer v. Farnsworth, 106 Vt. 180, 170 Atl. 677 (1934); *Hammond v. Hammond*, 227 App. Div. 336, 237 N.Y. Supp. 557 (3d Dep't 1929); *Linden v. Miller*, 172 Wis. 20, 177 N.W. 909 (1920); *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, 3 B.R.C. 79.

116. *Watrous v. Conor*, 266 Mich. 397, 254 N.W. 143 (1934) (Michigan purports not to recognize the doctrine, but does allow an inference of negligence to be drawn from circumstantial evidence in many cases); *Clark v. C. E. Fay Co.*, 281 Mass. 240, 183 N.E. 423 (1932); *Justice v. Weymann*, 306 Pa. 88, 158 Atl. 873 (1932); *Vannett v. Cole*, 41 N.D. 260, 170 N.W. 663 (1918).

117. *L'Ecuyer v. Farnsworth*, 106 Vt. 180, 170 Atl. 677 (1934); *Hammond v. Hammond*, 227 App. Div. 336, 237 N.Y. Supp. 557 (3d Dep't 1929); *Linden v. Miller*, 172 Wis.

automobile under the control of the defendant overturned for no apparent reason, the majority of cases have held that the doctrine applies.¹¹⁸

3. *Accident Would Have Happened without Any Act by Plaintiff.* The requirement that plaintiff's voluntary participation in the injurious occurrence be eliminated is also stated more broadly than either the decisions or the logic of the situation require. In a minority of states plaintiff must negative his own contributory negligence,¹¹⁹ but that requirement is separate from the present one and logically has nothing to do with it. What is needed here is that plaintiff's own negligence, along with that of anyone else for whom defendant is not responsible, be eliminated so as to complete the basis for an inference that the negligence of which the thing speaks is probably that of defendant. The present requirement is thus only one aspect of the second, which we have just discussed. It is apparent, therefore, that plaintiff's voluntary participation in the occurrence—even his exclusive control of the injuring agency—will not itself preclude the doctrine's application so long as his conduct does not impair the basis of the needed inference.¹²⁰ On the other hand, it is also apparent

20, 177 N.W. 909 (1920); *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, 3 B.R.C. 79. *Contra*: *Scott v. Checker Cab Co.*, 12 La. App. 598, 126 So. 241 (1930) (skid so extraordinary—across street, onto sidewalk, hitting plaintiff, and through store windows—as to indicate negligence).

Cf. *Butner v. Whitlow*, 201 N.C. 749, 161 S.E. 389 (1931) (*res ipsa loquitur* does not apply, but no error in sending case to jury where there was *direct* evidence that the skidding resulted from defendant's negligent driving).

118. *Fenstermacher v. Johnson*, 138 Cal. App. 691, 32 P.2d 1106 (1934); *Cookson v. Fitch*, 116 Cal. App. 544, 3 P.2d 27 (1931) (evidence included that defendant constructed car entirely of used parts). *Contra*, *Giddings v. Honan*, 114 Conn. 473, 159 Atl. 271 (1932) (*res ipsa loquitur* held inapplicable; cause of accident clearly shown to have been blow out of front tire) (court said: "Therefore the possible or probable causes were not . . . within the control of the driver. . . ." *Id.* at 476, 159 Atl. at 272, but, considering the evidence, a better reason for the decision would have been that the defect showed conclusively that the defendant was in no way negligent in failing to anticipate, discover, or prevent it, and that therefore he could not be guilty of negligence either with or without the application of the doctrine).

119. CLARK, CODE PLEADING 303 (2d ed. 1947); PROSSER, TORTS 288 (1941).

120. *Rafter v. Dnbrock's Riding Academy*, 75 Cal. App. 2d 621, 171 P.2d 459 (1946) (in action by rider against lessor of horse for injuries suffered when saddle came off, doctrine applies even though instrumentality causing accident was not in defendant's actual control; court uses theory of constructive control based on defendant's actual control at time of negligent act); *Killian v. Logan*, 115 Conn. 437, 162 Atl. 30 (1932) (*res ipsa loquitur* held applicable in action by tenant's employee against building

that the plaintiff may have to show his own due care in order to establish *that any negligence is probably defendant's*, even in states where he need not generally negative contributory fault.¹²¹ Thus in the typical bursting bottle case, plaintiff himself is handling the bottle when it explodes, but his testimony shows he is doing so in the usual, non-negligent manner.

4. *Evidence Must Be More Accessible to Defendant than Plaintiff.* A fourth requirement for the doctrine is sometimes also stated, that the evidence as to the explanation of the accident be more accessible to defendant than plaintiff. Most actual decisions, however, do not seem to support such a rule either as one of exclusion or in-

owner despite fact that plaintiff was using defective fire escape stairway at time of injury); *Freeman v. Schults Bread Co.*, 100 Misc. 528, 163 N.Y. Supp. 396 (N.Y. Munic. Ct. 1916) (baker liable for injuries caused by nail baked into bread notwithstanding that bread and nail were in plaintiff's mouth at time of injury).

A leading recent case upon this point is *Jesionowski v. Boston & Maine R.R.*, 329 U.S. 452 (1947). Here an employee was killed by the derailment of a backing train. Some evidence tended to show the accident was caused by deceased's improper signaling or throwing of a switch, but this was controverted. On this point the court said, "With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident, ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's activities did not cause the derailment, the defendant remains as the exclusive controller of all the factors which may have caused the accident." *Id.* at 458 (majority opinion by Black, J.).

121. The *Jesionowski* case, *supra* note 120, which arose under the Federal Employers Liability Act, furnishes an excellent example of this situation. Although defendant has the burden of proving contributory negligence under that act (to lessen damages; it is not a defense), yet the trial court charged:

Of course if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover. And since there can be no application of the doctrine of *res ipsa loquitur* if other causes than the negligence of the defendant, its agents or servants, might have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by a fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control—one of the prerequisites to the application of the rule here invoked." *Id.* at 454.

When plaintiff's activities could not have caused the injurious occurrences (though they might, for instance, have exposed him to it unnecessarily), the principle explained above would not apply, and the matter is solely one of the burden of proof on the issue of contributory negligence. See *Morris, Res Ipsa Loquitur in Texas*, 26 TEX. L. REV. 257, 270 (1948).

clusion.¹²² It does not necessarily follow that this consideration should have nothing to do with the matter. It has indeed been urged that it should not; that the courts should be concerned only with probabilities in each case, and that the adoption of any such test as this would put a premium on ignorance which is not usually accorded by the law.¹²³ But perhaps this argument suggests too strongly the rigidly logical pursuit of a nineteenth century ideal in a twentieth century situation wherein accident law is in transition towards "negligence without fault."¹²⁴ At any rate the notion per-

122. Many plaintiffs have successfully invoked *res ipsa loquitur* against defendants who had no knowledge and could give no explanation of how the accident happened. Extreme examples include: *Weller v. Worstall*, 50 Ohio App. 11, 197 N.E. 410 (1934), *aff'd*, 129 Ohio St. 596, 196 N.E. 637 (1935) (defendant died); *Nicol v. Geitler*, 188 Minn. 69, 247 N.W. 8 (1933) (only witness, with whose negligence defendant is charged, vanished); *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020 (1885) (explosion "scattered" all witnesses, etc., "to the four winds").

In fact, in most cases in which a complicated article or machine has caused injury, the defendant will have no better idea than will the plaintiff of the cause of the accident. Usually all he will know will be the methods and processes he has used and he will be quite in the dark as to the particular respect in which his precautions have proven defective. Clearly, in such cases, the courts are not pressing this fourth "requirement".

Compare also, as showing that the plaintiff may enjoy the benefits of the doctrine even though he might be able to explain some of the particulars of the accident, *Klatt v. Hoboken Bank for Savings*, 126 N.J.L. 96, 18 A.2d 602 (Sup. Ct. 1941) (*res ipsa loquitur* applicable even though plaintiff, struck by a keystone falling from its place on a building, was an expert stone cutter and "may have had some opinion as to how or why the accident happened"). Whether a result such as this would be reached were plaintiff's knowledge acquired by direct observation of the defect or if, for example, he knew the cause of the accident to be a specific act of the defendant's employee might be, of course, a different matter.

There have occasionally been cases which deny the doctrine's application at least partly on the ground of plaintiff's access to the facts. *Johnson v. Ostrom*, 128 Cal. App. 38, 16 P.2d 794 (1932); *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838 (1911). Cf. *Bahr v. Lombard*, 53 N.J.L. 233, 21 Atl. 190 (1890) (in suit arising from pipe explosion application of *res ipsa loquitur* refused on ground that plaintiff's case showed he possessed material evidence which he did not disclose).

123. "Certainly it is not the general rule that a plaintiff may place the burden of proof of an issue upon his adversary merely by showing that he himself is ignorant of the facts, and the defendant knows, or should know, all about them. If it were, sheer ignorance might be the most powerful weapon in the law." See Prosser, *Res Ipsa Loquitur, A Reply to Professor Carpenter*, 10 So. CALIF. L. REV. 459, 464 (1937). And see Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 203 (1949).

124. See Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMPORARY PROBLEMS 445, 447 (1950).

sists that one of the foundations of *res ipsa loquitur* is defendant's superior access to the facts.¹²⁵ Certainly the notion has not been and should not be made into a hard and fast rule. But probably in the complexity of logical and political factors which have sustained the doctrine for so long a time, one of the considerations that has made it easier to assume doubtful premises in favor of liability has been the desire to lighten the accident victim's burden of proof in some classes of situations where it is apt to be particularly onerous.¹²⁶ The defendant's exclusive control—where it has been shown to exist—may well have had similar effect.¹²⁷

It has occasionally been held that a plaintiff who pleads specific items of negligence thereby precludes himself from the benefit of *res ipsa loquitur* even though the proof makes out a case where it would otherwise apply.¹²⁸ The reason given for the rule is that such a plaintiff shows he has access to the facts and therefore is not in need of a doctrine designed to aid plaintiffs who lack this access.¹²⁹ Such a rule is generally repudiated and is altogether indefensible.

125. The greater accessibility of the evidence to the defendants was an important factor in the liberal decision in *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), *aff'd*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949). See also 65 C.J.S. 1000 (1950).

126. A similar—though not quite the same—thought is expressed by the New York court's statement that when courts must act on indecisive evidence because complete proof is impossible, "then the logical probative force of the evidence produced is measured, in part, by the test of whether it is the best evidence available." *Galbraith v. Busch*, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935), per Lehman, C.J. Quoted with approval by same judge in *Foltis, Inc. v. City of N.Y.*, 287 N.Y. 108, 115, 38 N.E.2d 455, 460 (1941). See also, Lord Mansfield in *Christie v. Griggs*, 2 Camp. 79, 80, 170 Eng. Rep. 1088 (1809): "What other evidence can the plaintiff give? The passengers were probably all sailors like himself;—and how do they know whether the coach was well built, or whether the coachman drove skilfully? . . . [defendant] has always the means to rebut this presumption [of negligence], if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere accident."

127. If that is the real office of these considerations, they should not be stated as restrictive "requirements" for this will, ironically, occasionally boomerang to narrow the scope of the doctrine. See, for examples, cases cited in notes 122 and 90 *supra*.

128. *Midland Valley R.R. v. Conner*, 217 Fed. 956 (8th Cir. 1914); *O'Rourke v. Marshall Field & Co.*, 307 Ill. 197, 138 N.E. 625 (1923); *Connor v. Atchison, T. & S.F. Ry.*, 189 Cal. 1, 207 Pac. 378 (1922); *Roscoe v. Metropolitan Street Ry.*, 202 Mo. 576, 101 S.W. 32 (1907); *Porter v. Rasmussen*, 127 Cal. App. 405, 15 P.2d 888 (1932); and see cases cited in Niles, *Pleading Res Ipsa Loquitur*, 7 N.Y.U.L.Q. REV. 415, 420 n.19 (1929) and Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 527 n. 49 (1934).

129. "The rule of presumptive negligence and the rule allowing the pleading of negligence, generally, are rules which grow up out of necessity in cases of this character,

It may (to be sure) fairly be urged that the pleadings must lay a basis for the application of the doctrine in any given case, but this rule of fairness should be administered in accordance with the liberal principles of modern pleading and not according to any rule of thumb. Thus, as we have seen, the proof in a *res ipsa loquitur* case seldom points to a single specific act or omission.¹³⁰ Typically, it points to several alternative explanations involving negligence (*e.g.*, negligence in construction, maintenance, or operation) without indicating which of them is more probable than the other.¹³¹ In such a case the pleadings may well be required to cover the alternative explanations, so as to give fair notice to the adversary of the scope of the case he has to meet. In practice this usually is not a very onerous requirement and can be met either by broad generality of allegations, or by listing all the specific acts or omissions to which the proof may point, or by combining general with specific allegations.¹³² And even if the pleadings fall short in this respect, free use of amendment should be allowed and the pleadings treated as

and are exceptions to the general rules of pleading and proof. Where plaintiff, by his petition, admits that there is no necessity, the reason for the rule, *ex necessitate*, fails, and with it the rule itself." *Roscoe v. Metropolitan Street Ry.*, 202 Mo. 576, 587, 101 S.W. 32, 34 (1907). Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 527 (1934) also notes the same rationale for this position.

130. If it does, the doctrine should be available under an allegation of this specific ground of negligence. *McCray v. Galveston, H. & S.A. Ry.*, 89 Tex. 168, 34 S.W. 95 (1896); *Texas & P. Coal Co. v. Daves*, 41 Tex. Civ. App. 289, 92 S.W. 275 (1906), discussed in Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 761, 763 (1948). Other cases in which the plaintiff has been allowed the assistance of *res ipsa loquitur*, but only to enable him to establish the existence of the acts of negligence specifically pleaded, include: *Pickwick Stages Corp. v. Messinger*, 44 Ariz. 174, 36 P.2d 168 (1934); *Alabama & V. Ry. v. Groome*, 97 Miss. 201, 52 So. 703 (1910); *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 47 S.E. 329 (1904); *Terre Haute & I.R.R. v. Sheeks*, 155 Ind. 74, 56 N.E. 434 (1900); *Queirolo v. Pacific Gas & Electric Co.*, 114 Cal. App. 610, 300 Pac. 487 (1931); *Atkinson v. United Railroads of San Francisco*, 71 Cal. App. 82, 234 Pac. 863 (1925).

131. Thus in *Griffen v. Manice*, 166 N.Y. 188, 59 N.E. 925 (1901), plaintiff was a passenger in an elevator when it dropped suddenly to the bottom of the shaft, and he was killed when the counterweights fell through the elevator roof onto him. Probably no specific item of defendant's negligence could have been pointed out. In *Cassini v. Curtis Candy Co.*, 113 N.J.L. 91, 172 Atl. 519 (Sup. Ct. 1934), (typical of cases involving foreign substances in food processed by defendant), there was no single definite explanation for the presence of a worm in the candy bar involved.

132. But even where the complaint contains a general allegation as well as specific allegations of negligence, many courts refuse to allow application of the doctrine. See, *e.g.*, *Orcutt v. Century Building Co.*, 201 Mo. 424, 99 S.W. 1062 (1906); *Highland*

amended where defendant's proof has been directed to all the claimed explanations so that the matter may be treated as litigated by consent. Only in a case where defendant has been genuinely and justifiably misled by the pleadings so that he has actually failed to prepare a defense to a case based on the doctrine should its application be denied on the basis of the pleadings. This seems to be the general rule.¹³³

The stricter minority rule¹³⁴ rests on two misconceptions. In the first place the doctrine is not restricted to a plaintiff who lacks access to the facts which explain an accident. Even though superior access by defendant in a class of cases may well facilitate drawing an inference of negligence in such cases generally, there is no rule extending the doctrine to all cases where a plaintiff lacks proof, or withholding it from any given plaintiff who has proof.¹³⁵ In the second place, the pleadings do not show that plaintiff has access to the facts alleged. In the usual case the pleader will need and desire an application of the doctrine, but because he is uncertain whether the court will apply it in his case, he puts an anchor to windward to guard against failure in this direction and hopes that he will be lucky enough—if there is need—to prove something specific, often out of the mouths of hostile witnesses. In such a case it would be silly to say (even if that were the test) that the pleadings show plaintiff had as ready access to the facts as defendant.

Ave. B.R.R. v. South, 112 Ala. 642, 20 So. 1003 (1896); cf. McManamee v. Missouri Pac. Ry., 135 Mo. 440, 37 S.W. 119 (1896).

133. There is even a division among the majority of states which do apply *res ipsa loquitur* despite allegations of specific negligence. Some states apply the doctrine regardless of the form of pleadings (see cases cited in Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 255 n. 77 (1936)—ten states listed) while others only apply the doctrine if a general allegation of negligence accompanies the specific one (*Id.* at 255 n. 76, listing cases from eight jurisdictions). In connection with this latter group of cases, note *Rosenzweig v. Hines*, 280 Fed. 247, 248 (W.D. N.Y. 1922) in which the court, desirous of applying *res ipsa loquitur*, picked the pleadings apart and found a general charge of negligence "even though it is a part of the specific charge of negligence."

134. See cases and text at notes 128 and 132 *supra*.

135. "If the circumstances are such as to create a reasonable inference of the defendant's negligence . . . a plaintiff . . . can scarcely make out a case merely by proving that he knows less about the matter than his adversary." Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 203 (1949). And see *Monkhouse v. Johns*, 142 So. 347, 351 (La. 1932): ". . . the application of the rule should not be confined to cases where plaintiff is entirely ignorant of the cause or causes of the accident."

It is also sometimes said that a plaintiff's proof of specific facts will preclude application of the doctrine.¹³⁶ A great deal of what was said about specific pleading is applicable here too, but there may be an important difference. Proof may show just how the accident happened and this showing may preclude the likelihood of defendant's negligence or so reduce it as to leave an insufficient basis in probabilities for an inference of negligence. Thus if a sidewalk pedestrian is struck on the head by a brick from defendant's building he is, on that showing alone, entitled to the benefit of the doctrine. But if he proves that the brick fell from the chimney when some men (not connected with defendant) leaned against it while watching a parade, he has proved himself out of court, since it no longer appears likely enough that the occurrence was due to defendant's careless construction or maintenance of his chimney.¹³⁷ Cases like this are fairly rare, but when they occur the obstacle to plaintiff's recovery is far more serious than a matter of variance which should be curable under liberal pleading rules. Short of this, the fact that a plaintiff offers specific proof should be given no more than its logically probative effect, and this may or may not eliminate some of the possible explanations of the occurrence. Thus, if a railroad employee injured by the derailment of a train he was riding introduces evidence of a defective spike in the track, this may, if credited, lead to a finding of specific negligence (assuming the defect was proven to be discoverable, etc.). In that case the doctrine is not needed. But if the proof of that explanation fails (either because it is legally insufficient or because it is not credited), the mere fact that it was offered has no logical tendency to eliminate

136. See cases cited in Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 254 n.71 (1936). For cases *contra*, see *id.* at 254 n.72 and Note, 93 A.L.R. 609 (1934). The distinction appears to be that where the facts of an accident are clearly, fully disclosed by plaintiff's evidence, nothing being left to inference, there is no room for the application of the doctrine. But where the plaintiff unsuccessfully attempts to establish the specific cause of the accident, a general inference that the defendant has been negligent may still be drawn and courts will apply *res ipsa loquitur*.

137. *Strasburger v. Vogel*, 103 Md. 85, 63 Atl. 202 (1906). The court said that if plaintiff had rested on *res ipsa loquitur*, and the defendant had offered the explanation, the issue would have been for the jury. This points a moral to plaintiffs about the dangers of proving too much where *res ipsa loquitur* or a presumption is available. See also *Binns v. Standen*, 118 Cal. App. 625, 5 P.2d 637 (1931) (guest suing driver proved accident occurred when driver was momentarily blinded by the sun) and see discussion in PROSSER, TORTS 306 (1941) and cases cited *id.* at 307 n.53.

other explanations involving railroad negligence (speed or other faulty operation, defects in construction, other defects in maintenance, etc.), and there is no sound basis for denying application of the doctrine (or, as some would put it, refusing to allow the inference of negligence in other respects). Indeed, failure to prove affirmatively a specific explanation does not necessarily remove that explanation itself from the range of possibilities. Whether it does so depends on the circumstances.¹³⁸ Of course, in any given case the proof might show that the defective spike *was* the *only cause* of the derailment. The case should then turn on (1) whether there was specific proof that the defect was discoverable at a time when the railroad should have discovered it, and if such proof either was not offered or was insufficient, (2) whether the doctrine of *res ipsa loquitur* should be applied to defective spikes.

EFFECT OF RES IPSA LOQUITUR

So far we have been discussing the question whether the plaintiff's case (as made by pleadings and proof) comes within the doctrine of *res ipsa loquitur*. If it does, further questions arise as to the consequences of this fact, at that point and later in the proceedings. It is in connection with these consequences that most of the confusion and controversy among courts and commentators have arisen. Yet all agree on one thing: *if*¹³⁹ the plaintiff has made out a *res ipsa loquitur* case, he succeeds in avoiding a motion for nonsuit or directed verdict at the close of his own case.¹⁴⁰ Curiously enough, so far as recovery in the trial court goes, this agreed-upon proposition is nearly always the all-important one. Plaintiffs rarely lose *res ipsa loquitur* cases at the jury's hands, except where a defendant's explanation of the accident is factually very convincing (a rela-

138. The court in *Leet v. Union Pac. R.R.*, 60 Cal. App. 2d 814, 144 P.2d 64 (1943), *aff'd*, 25 Cal. 2d 605, 155 P.2d 42 (1944), *cert. denied*, 325 U.S. 866 (1945) followed this general reasoning on similar facts.

139. As we have seen, there may be room for great controversy in determining *whether* such a case is made out at all.

140. See Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 523 (1934); Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, summarized at 746-47 (1928); Morris, *Res Ipsa Loquitur in Texas*, 26 TEXAS L. REV. 761, 770 (1948); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 243 (1936).

tively rare occurrence).¹⁴¹ The subject matter of most of the academic controversies by courts and law teachers arises in practice only on appeal, or in the highly exceptional situation in the trial court (except that the competing theories are reflected here by instructions, the main significance of which is as ground of error on appeal).

Even in this sphere of controversy there has emerged a rule which represents the clear weight of American authority. This rule reflects the analysis which sees in *res ipsa loquitur* only an aspect of general principles of inference from circumstantial evidence. This is the view often generally called the "permissible inference" theory.¹⁴² The most frequently quoted statement of the rule was made by the U.S. Supreme Court in *Sweeney v. Erving*:

... *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.¹⁴³

The practical implications of this rule are these:

(1) Upon the close of plaintiff's evidence, defendant is not entitled to a nonsuit or directed verdict.

(2) If defendant also rests at this point without putting in any

141. Statistics have repeatedly demonstrated the sympathy of juries towards accident victims (See note 61 *supra*), and it seems reasonable to assume that this general attitude would be even more marked in the types of cases in which *res ipsa loquitur* would be applied. Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 217 (1949) is in agreement with this conclusion. See also note 150 *infra*.

142. See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 245-47 (1936); Comment, 12 CALIF. L. REV. 138, 140 (1924); Note, 53 A.L.R. 1494, 1511 (1928). Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 732-36 (1928) take no stand as to which rule is favored by a majority of jurisdictions. Even Shain, who contends that this position bespeaks ignorance or misinterpretation of the entire body of pre-1900 *res ipsa* precedent, cites cases from thirty-six jurisdictions supporting the view he condemns. SHAIN, *RES IPSA LOQUITUR, PRESUMPTIONS AND BURDEN OF PROOF* 182-187 (2d ed. 1947).

143. *Sweeney v. Erving*, 228 U.S. 233, 240 (1913).

evidence, plaintiff is *not* entitled to a directed verdict unless upon the facts of a particular case "the *prima facie* proof is so convincing that the inference of negligence arising therefrom is inescapable if not rebutted by other evidence,"¹⁴⁴ a situation which would not be true in the great majority of cases.

(3) If defendant puts in evidence which tends to explain the accident or rebut the inference of negligence, this will not entitle defendant to a directed verdict, unless in any given case the proof is so convincing that (under general principles governing the functions of judge and jury) reasonable minds could not draw an inference of negligence in the face of it.¹⁴⁵ Like the situation where plaintiff is entitled to a directed verdict, this one is extremely rare in practice.

(4) The vast majority of *res ipsa loquitur* cases go to the jury.¹⁴⁶

(5) The jury should be told (on the issue of negligence) that plaintiff can recover only if they find that defendant was more probably negligent than not; that in the case at bar the circumstances of the accident afford a basis for an inference, which they may but need not draw, that defendant was negligent; and that in determining this matter they should consider the explanation and rebuttal (if any) offered by defendant.¹⁴⁷

144. *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 121, 38 N.E.2d 455, 462 (1941). (This decision ends the confusion and uncertainty of the law in New York by adopting the majority rule as to the procedural effect to be given to *res ipsa loquitur*.) See Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 742 (1928); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 243, 244 (1936); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 523 (1934).

145. See James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 672, 677 (1949). Examples are *Sims v. Dallas Ry. & Terminal Co.*, 135 S.W.2d 142 (Tex. Civ. App. 1939); *Klitzke v. Webb*, 120 Wis. 254, 97 N.W. 901 (1904); and cases cited in Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 256 n. 82 (1936).

146. See sample of cases analysed in note 150 *infra*.

147. "The judge should not charge the jury that there would be an inference of negligence from a given state of facts, but should instruct them . . . that negligence must be proven, and it is for them to consider whether the manner of the occurrence and the attending circumstances are of such a character that they would, in their judgment and discretion . . . draw an inference that the occurrence could not have taken place if due diligence . . . had been exercised. And they should also be instructed that, while they are not required by the law to draw any inference of negligence from the matter, still it is within their province to determine whether the circumstances are such that such an inference might be properly drawn." *Palmer Brick Co. v. Chenall*, 119 Ga. 837, 843, 47 S.E. 329, 330 (1904).

In addition to the permissible inference theory (just described) there are competing theories as to the effect of the doctrine which have had some currency with courts and commentators. In the main they resolve themselves into two. These are not mutually exclusive but they stress different procedural aspects. The first of these theories would give a plaintiff's *res ipsa* case the effect of creating a *presumption* rather than simply a basis for an *inference of negligence*. The principal difference between this and the prevailing view lies in the second practical effect of the doctrine, noted above. If the defendant introduces no evidence tending to rebut a *presumption* (as the word is used here), plaintiff is entitled to a directed verdict even though his case might not be so strong and unequivocal as to require that result under the inference theory.¹⁴⁸ A presumption, in other words, gives to evidence an artificial effect over and above its logically probative effect. The difference is far more theoretical than real. Few defendants fail to offer some defense by way of explanation or rebuttal in litigated *res ipsa* cases. And if no defense is offered, defendant is usually gambling on a court ruling that the doctrine does not apply. He does not expect to win from a jury and almost never will. Plaintiff does not need a directed verdict and is ill-advised to move for one except under a procedure for reserving decision on such a motion until after verdict.¹⁴⁹ For these reasons few of the cases which use the language of presumption actually deal with a situation where it would affect the result.¹⁵⁰

148. See Heckel & Harper, *Effect of Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 741, 742, 746, 747 (1928). Of course adoption of the "presumption" theory does not involve rejection of the "inference" theory as each plays a role at a different time, in the trial. See discussion, note 152 *infra*.

149. This was done, under such a procedure, in *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941).

150. In a leading article on the subject, Prosser lists seven states as having more or less espoused the presumption theory. In the notes, some 39 cases are cited as using the reasoning or language of presumption. *In only a single one of those cases does it appear that plaintiff asked for a directed verdict and this was the only instance in which the court directed such a verdict.* *Hogan v. Manhattan Ry.*, 149 N.Y. 23, 43 N.E. 403 (1896). A recent New York decision suggests that the strength of plaintiff's proof in the *Hogan* case might have warranted the result there even under the inference theory. *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941). There was another case in which the official reporter described the verdict as directed, but a full reading of the opinion shows that reversal was based on language in the instructions to the jury which was too favorable to the plaintiff. *Duerr v. Consol. Gas Co.*, 86 App. Div. 14, 83 N.Y. Supp. 714 (1st Dep't 1903).

It is also interesting to note that *in not a single one of these 39 cases was there a*

The concept of presumption, as used above, is addressed to the court's function, not the jury's. It is simply a direction for taking the case away from the jury where the defendant offers no evidence to rebut it. Consequently in strict theory it should never find its way into instructions to the jury. Not infrequently it does, however, and the jury is told that the facts of the accident create a presumption of negligence which they may weigh against defendant's explanations.¹⁵¹ Most courts hold this language inappropriate.¹⁵² It has been aptly described as an invitation to weigh ten pounds of sugar against half-past two in the afternoon.¹⁵³ But the distinction between presumption and inference, and the point of the epigram, are too precious to cause a jury much trouble, and often where no injustice

defendant's verdict (except where directed by the court). In 31 of them plaintiff had a verdict at the hands of the jury (14 of these were reversed, mostly for errors in the charge). See Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 248-49 notes 44-50 (1936) (only cases cited as supporting the presumption theory were counted).

151. *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931) (discussed in *McBaine, Presumptions, Are They Evidence?* 26 CALIF. L. REV. 519, 538-543 (1938)); *Raymer v. Vandenberg*, 10 Cal. App. 2d 193, 51 P.2d 104 (1935). This is also the rule in Vermont: *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (1907) (malpractice suit). But cf. *Huntley v. Rutland Ry.*, 83 Vt. 180, 74 Atl. 1000 (1910) (fire negligently caused by sparks from defendant's railroad engine).

152. *Lawson v. Mobile Electric Co.*, 204 Ala. 318, 85 So. 257 (1920); *Bollenbach v. Bloomenthal*, 341 Ill. 539, 173 N.E. 670 (1930); *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870 (1911); and see 9 *Wigmore, Evidence* § 2491.

The difficulty arises because some courts do not realize that allegiance to the presumption theory does not preclude use of the inference theory. Each has a place, at different times, in the trial of a negligence question. Thus a court adhering to the presumption theory should invoke the doctrine to direct a verdict if the defendant rests without putting in any evidence tending to establish his conduct as non-negligent; the doctrine should be discarded, as a presumption, if the defendant does put in such evidence. Later, when the case is submitted to the jury (as it must be if neither party's evidence is so overwhelming as to require a directed verdict in his favor) the court's instruction may still speak of *res ipsa loquitur* as permitting the jury to infer negligence from the circumstances of the accident.

153. See Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 225 (1949). However, courts holding it error to charge that a presumption is evidence, to be weighed as such against defendant's rebutting evidence, probably do not do so with the abstract notion in mind that a rule of law cannot be balanced against evidence, but because they fear that, when circumstantial evidence is given a legal title and pronounced to have perceptible mass, a jury may possibly be led to believe that the law requires them to give the plaintiff a better break than it actually does under the circumstances.

would result the inappropriate language is held to be harmless error.¹⁵⁴

The third theory as to the effect of *res ipsa loquitur* is that it shifts to defendant the burden of persuading the jury, by a preponderance of the evidence, that the injury did not result from his negligence.¹⁵⁵ This may, but need not, be coupled with the presumption rule. This burden finds expression in language of the charge which will come into play (theoretically) only if the jury finds the probabilities in equipoise.¹⁵⁶ The practical effect of such language on the jury is highly speculative. It probably amounts to very little. But such a direction is generally held to constitute reversible error except in a minority of jurisdictions, where it is required.¹⁵⁷

There has been much controversy as to whether the policies behind *res ipsa loquitur* require it to be given one of the effects accorded by these minority rules. Professor Carpenter has cogently argued that they call for the full maximum effect last described.¹⁵⁸ Dean Prosser has ably answered that the law has no general policy to relieve ignorant plaintiffs of the burden of proving their cases, and that where a policy exists in favor of especially strict responsibilities (as in the case of carriers and bailees) it should be implemented by a rule which would shift the risk of non-persuasion to defendants in all cases within the scope of the policy rather than by a rule which

154. *Mudrick v. Market St. Ry.*, 11 Cal. 2d 724, 81 P.2d 950 (1938); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 230 (1949).

155. See cases from Alabama, Arkansas, Louisiana and Pennsylvania cited in Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 250 notes 52-55 (1936); Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 526 n.46 (1934), listing cases from each of ten jurisdictions, six of which Prosser would classify elsewhere if at all; Heckel & Harper, *Effect of Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 734, 735 (1928); and see Notes, 59 A.L.R. 486 (1929) and 92 A.L.R. 653 (1934).

156. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 244, 245 (1936) and authorities cited.

157. For cases finding such a direction to be error or stating that in cases in which *res ipsa loquitur* is applicable the burden of proof does not shift, see *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 38 N.E.2d 455 (1941); *Fallo v. N.Y., N.H. & H. Ry.*, 123 Conn. 81, 192 Atl. 712 (1937); *Nemecz v. Morrison & Sherman, Inc.*, 109 N.J.L. 517, 162 Atl. 622 (1932); *Kilgore v. Brown*, 90 Cal. App. 555, 266 Pac. 297 (1928); and cases cited in 65 C.J.S. 1022 n.70 (1950). For cases reaching an opposite result and requiring a direction that *res ipsa loquitur* shifts the burden of disproving his negligence to the defendant, see cases cited in authorities in note 155, *supra*, and 65 C.J.S. 1021 n. 66 (1950).

158. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. OF CHI. L. REV. 519, 529-535 (1934); Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 So. CALIF. L. REV. 459 (1937).

applies to circumstantial proof only.¹⁵⁹ If I thought it important I should side with Professor Carpenter because I welcome trends in the law which minimize obstacles in the way of compensation for accident victims, whether those obstacles are substantive or procedural. And I am willing to endorse rules which have this tendency, and some reasonable chance of adoption into our actual legal structure, whether or not they satisfy an aesthetic yearning for doctrinal consistency.¹⁶⁰ But this particular tempest seems to be one in a teapot. In most of these cases the only serious obstacle to plaintiff's recovery is the possibility that he may not make out a *res ipsa* case in the first place. If he does, it will make little practical difference to him which of the competing theories the court has adopted. The only serious obstacles then would arise from a convincing meritorious defense, or the danger of reversal on appeal. Of course the latter danger may be considerable where the decisions in a jurisdiction are in confusion—a state of things which is far more of an obstacle to plaintiffs than the adoption of any one of the competing rules would be.

DEFENDANT'S PROOF

Defendant in a *res ipsa* case may show by evidence how the accident happened, but ordinarily this does not entitle him to a directed verdict.¹⁶¹ The jury may still reject the evidence or find that the explanation does not preclude the likelihood of negligence. Very occasionally, however, the evidence in explanation is so strong and the explanation itself so completely exonerates defendant, that reasonable minds could no longer draw an inference of his negligence and a verdict will be directed for him. Thus in a derailment case, where the railroad showed it was caused by the act of a saboteur (who had pleaded guilty to the crime) in opening a siding switch at night (just before train time) and turning the signals to show all clear for

159. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 259, 267 (1936); Prosser, *Res Ipsa Loquitur, A Reply to Professor Carpenter*, 10 SO. CALIF. L. REV. 459 (1937).

160. Cf. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); and *Replication*, *id.* at 1178.

161. See Heckel & Harper, *Effect of the Doctrine of Res Ipsa Loquitur*, 22 ILL. L. REV. 724, 738-747 (1928); Morris, *Res Ipsa Loquitur in Texas*, 26 TEX. L. REV. 257, 761, 776-778 (1948); PROSSER, TORTS 309 (1941).

the main line, the railroad was entitled to judgment as matter of law.¹⁶² But that would not be the case if the jury might find that the railroad should have discovered the saboteur's handiwork before the accident.¹⁶³

In most *res ipsa loquitur* cases defendant cannot definitely explain the accident. His usual defense consists of proof of the precautions he did take in constructing, maintaining, and operating the injuring instrumentality.¹⁶⁴ Once in a great while such proof may conclusively show that the accident did not in fact happen, or that it was not caused by defendant.¹⁶⁵ But this is seldom the outcome. And

162. *Gray v. B. & O. Ry.*, 24 F.2d 671 (7th Cir. 1928). See also *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870 (1911) (defendant proved that a third party had torn down defendant's electric power wire ten minutes before plaintiff's decedent was killed when his horses were frightened by it); and *Tyreco Refining Co. v. Cook*, 110 S.W.2d 219 (Tex. Civ. App. 1937) (explosion while defendant refinery was loading plaintiff's truck with gasoline; judgment for plaintiff reversed on ground that evidence tending to show that third party struck match was erroneously excluded).

163. For example, in *Kanter v. St. Louis, S. & P. Ry.*, 218 Ill. App. 565 (1920), the derailment, as a result of which plaintiff's decedent was killed, was shown to be the result of "acts of vandalism committed by persons unknown," but a jury verdict for the plaintiff was upheld on the ground, *inter alia*, that the operator of the car could have been found negligent in not seeing the displaced rail until he was almost upon it.

164. See, e.g., *Fallo v. N.Y., N.H. & H. Ry.*, 123 Conn. 81, 192 Atl. 712 (1937) (evidence as to regularity of inspections); *Jianou v. Pickwick Stages System*, 111 Cal. App. 754, 296 Pac. 108 (1931) (evidence of inspection of wheels of stage, one of which broke); *Sand Springs Park v. Schrader*, 82 Okla. 244, 198 Pac. 983 (1921) (evidence of inspection of "rolly-coaster" car which became detached and rolled into similar car in which plaintiff was riding); *Houston, E. & W. T. Ry. v. Roach*, 52 Tex. Civ. App. 95, 114 S.W. 418 (1908) (evidence of inspection and repairing of heating equipment on train).

165. *Swenson v. Purity Packing Co.*, 183 Minn. 289, 236 N.W. 310 (1931) ("How the larva became embedded in the loaf of bread is a mystery.") Decision is roundly and justly criticised by Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 269 (1936); *Rogers v. Coca-Cola Bottling Co.*, 156 S.W.2d 325 (Tex. Civ. App. 1941) (evidence as to equipment and carefulness of operations in defendant's plant successfully rebutted inference that bottle contained cockroach when it left plant and that defendant was in any way negligent); and *Jump v. Ensign-Bickford Co.*, 117 Conn. 110, 167 Atl. 90 (1933) (dynamite exploded prematurely, defect allegedly in fuse used to ignite it; manufacturer of fuse introduced "uncontradicted" evidence of effectiveness of processes used by him to eliminate defective lengths of fuse; judgment n.o.v. for defendant upheld).

Note *Gritsch v. Pickwick Stages System*, 131 Cal. App. 774, 22 P.2d 554 (1933), in which some of the evidence which established defendant's non-negligence was put in by the plaintiff (plaintiffs showed that the driver of the car which crashed into the bus in which they were riding was negligent and that his negligence was the proximate cause of the accident).

where it is not, defendant is in this dilemma: the less effective his precautions to prevent the occurrence the more apt they are to appear negligent; the more effective the precautions testified to, the less likely they are to have been taken in this case since the accident *did happen*.¹⁶⁶ Indeed the showing of a foolproof system of precautions *demonstrates* negligence unless it succeeds in convincing the trier that no such occurrence ever proceeded from defendant.¹⁶⁷

Logically defendant's best line of defense would often be to show that such accidents *do happen*—perhaps not infrequently—in spite of all reasonable precautions. This tends to undercut the very premise on which *res ipsa loquitur* rests. Where this is found to be the case by the courts on the basis of common experience (as with the airplane¹⁶⁸ or with unsuccessful results of medical treatment)¹⁶⁹ it precludes application of the doctrine. But where the courts have not become familiar with the fact and frequency of such casualties through common experience, it is sometimes dangerous business to put in evidence of them. Unless the court is very much impressed with the social importance of so dangerous an enterprise it may (perhaps quite

166. "If the care commonly used by defendant had been exercised the presence of these pieces of glass in the cream sold to plaintiff would have been impossible. Yet the fact remains that there they were . . ." *Minutilla v. Providence Ice Cream Co.*, 50 R.I. 43, 49, 144 Atl. 884, 887 (1929). See also PROSSER, TORTS 309 n.69 (1941).

Of course, strong evidence of precautions may succeed in convincing the trier that the plaintiff's injury was the result of an "unavoidable accident", as in *Alagood v. Coca-Cola Bottling Co.*, 135 S.W.2d 1056 (Tex. Civ. App. 1940) (explosion of bottle). See note 165 *supra*, for cases in which the defendant prevailed upon a showing of the thoroughness of his precautions.

167. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (bottle explosion due either to overcharge or to defect in glass structure; court concluded that defect in bottle would indicate bottler's negligence because bottle manufacturer's evidence showed that its tests for undisclosed defects were almost fool-proof and therefore any defect there may have been would have been discoverable by the bottler with due inspection).

168. *Herndon v. Gregory*, 190 Ark. 702, 81 S.W.2d 849 (1935); and see cases cited in O'Connor, *Res Ipsa in the Air*, 22 IND L.J. 221, 225-227 notes 24-35 (1947). This position receives strong and oft-cited support from a note by Harper, *Res Ipsa Loquitur in Air Law*, 1 AIR L. REV. 478, 480, 481 (1930).

169. See *Ewing v. Goode*, 78 Fed. 442, 443 (C.C.S.D. Ohio 1897) ("If the maxim, 'res ipsa loquitur', were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'."). And see cases collected in Shain, *Res Ipsa Loquitur*, 17 SO. CALIF. L. REV. 187, 217 (1944).

illogically) conclude that the existence of such casualties itself shows the enterprise is negligently carried on.¹⁷⁰ This is but another indication that the life of the law has not always been logic—especially where the premises are outmoded. The significant thing about *res ipsa loquitur* is not that it is formally only an aspect of the principles governing logical inference from circumstantial proof. On the contrary it has been found significant as a formula for relaxing the former rigidity of the logical pursuit of fault at a time when the importance of fault itself has been waning.

170. This conclusion was reached in *Grant v. Graham Chero-Cola Bottling Co.*, 176 N.C. 256, 97 S.E. 27 (1918) (evidence of explosion of many bottles) and note the discussion of railroad fire cases in *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020 (1895). Prosser agrees, citing bursting bottle cases from Kentucky (PROSSER, TORTS 297 (1941); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241, 261 (1936)).

But this logic is not compelling. The occurrence of a large number of unexplained accidents *could* just as well mean that they are unavoidable, regardless of due care, as that they are the product of negligence. See cases cited in notes 168 and 169 *supra*, and Morris, *Res Ipsa Loquitur in Texas*, 26 TEX. L. REV. 257, 761, 777 (1948): "Expert opinion or statistical evidence adduced by defendant to point out that such accidents frequently happen even though due care is used undoubtedly weakens, if it does not destroy, the inference of negligence.", citing *Taylor v. Popular Dry Goods Co.*, 10 S.W.2d 191 (Tex. Civ. App. 1928) (evidence that plaster frequently falls from ceiling without warning and despite careful application and maintenance; verdict for defendant upheld) and *Texas & N.O. R.R. v. Schreiber*, 104 S.W.2d 929 (Tex. Civ. App. 1937) (evidence that locomotives may emit smoke, soot and oil even though proper care is used; *res ipsa loquitur* held inapplicable and judgment for plaintiff reversed).

This point is made not to quarrel with Prosser's conclusion (for I *guess*, as does he, that the inference of negligence is the sounder one in most situations where accidents recur frequently) but only to point out that it is not logic which dictates the result reached. Logic, in these instances, is equivocal. So decisions tend to hinge upon a court's view of the social utility of the defendant's enterprise (compare the aircraft industry with the soft drink industry) tempered somewhat by the grossness of the negligence involved. See, e.g., *Brown v. Shortlidge*, 98 Cal. App. 352, 277 Pac. 134 (1929) (*res ipsa loquitur* applied in action by patient against doctor who knocked out her tooth while adjusting gag preparatory to tonsillectomy, notwithstanding defendant's evidence that such an occurrence was "unlucky" and that there were many conditions under which, without negligence, such an occurrence might happen).